

passed through a vineyard, or oliveyard, to gather, and eat without carrying away. *Deut.* xxiii. 24, 25.

2. By the *Rhodian* law (*k*), and the common maritime custom, if the common provision for the ship's company fail, the master may under certain temperaments break open the private chests of the mariners or passengers, and make a distribution of that particular and private provision for the preservation of the ship's company. *Vide Consolato del Maré, cap.* 256 (*l*). *Les customs de la Mere, p.* 77.

3. Nay, I find, among our *English* voyages to the *West-Indies* described by *Hackluit*, that it was a received custom, that if a ship wanted necessaries, and the inhabitants of the continent would not furnish them for money, they might, by the usage of the sea and nations, take provision by force, making the inhabitants reasonable satisfaction; for in these cases the common consent of nations hath made it lawful, and therefore it is lawful; 1. because necessary in extremity; 2. because there are no other means to obtain it by an application to superiors; but were this done by *English* [56] mariners upon the *English* shore, where both are under the same civil magistrate the case would be otherwise, because capable of another remedy.

It is not lawful voluntarily to assist the king's enemies with money or provision, for it is an adhering to the king's enemies, and so treason within the letter of the statute of 25 *E.* 3. but yet, if the king's enemies come into a county with a power too strong for the county to resist, and will plunder the country, unless a composition be made with them, such a ransoming of themselves is so far from being treason, that it hath been allowed as lawful. 1. In respect of the extreme necessity. 2. Because it is a less detriment to the country, and a less supply to the enemy, than that plunder would be; and for that purpose I shall set down the case at large.

M. 14 *E.* 2. *B. R. Rot.* 60. *Dunelm.* " Placitum de transgressi.
" coram *A. D. de Brome* & fociis suis justiciariis domini Regis in
" episcopatu *Dunelm.* sede vacante anno decimo regni sui mittitur huc
" propter errores, &c. Juratores dicunt, quod *Scoti* inimici & rebelles
" regis prædict. die Martis in festo Sanctæ *Catharinæ* virginis anno
" regni regis nunc nono ingressi fuerunt terram episcopatus *Dunelm.*
" eâ de causâ, ut ipsam destruerent, & quod omnes de communitate

(*k*) *Vide Dig. Lib. XIV. tit. 2. de lege Rhodia de jactu, l. 2. §. 2. in fine. Leg. G.*

lielmi Conquest. cap. 38.

(*l*) Printed at Venice 1584. in 4to.

“ episcopatus prædicti tunc apud *Dunelm.* existentes, volentes præ-
 “ cavere dictorum inimicorum malitiam, ordinârunt, quod unus-
 “ quisque illorum præstarent sacramentum corporale stare ordinationi,
 “ quæ pro proficuo communitalis prædictæ contingeret ordinari, qui
 “ quidem *Willielmus de Heberne* jurat’ fuit cum aliis, &c. Item quod
 “ post consuluerunt facere finem cum prædictis inimicis, & cum eis
 “ fecerant finem de mille & sexcent’ marc’; quam quidem summam
 “ oporteret solvi incontinenti per quod, quia non habuerunt pecu-
 “ niam prestò, ordinârunt, quod quidam de communitate prædicta
 “ irent de domo in domum infra ball.’ *Dunelm.* & extra, & perscu-
 “ tarent ubi denarii essent in deposito, & ubicunq; denarii hujusmodi
 “ invenirentur, caperentur ad solutionem dicti finis festinand’,
 “ quousq; levare possit de communitat. prædict. & satisfieri illis,
 [57] “ quorum denarii sic capiendi fuerunt; et quod prædictus
 “ *Willielmus de Kellawe* simul cum quodam *David de*
 “ *Rotheber* jurat’ ad perscrutandum in formâ prædictâ venit ad præ-
 “ dictas domos, & cistam & 70l. de propriis denariis ipsius *Willielmi*
 “ *de Heberne* in cista prædicta inventas cepit & asportavit, &c. Et
 “ juratores requisiti, si prædictus *Willielmus de Heberne* consentiebat
 “ captioni prædictorum denariorum, dicunt, quod non, & quia com-
 “ pertum est, &c. quod ubi prædicta ordinatio fuit facta de denariis
 “ in deposito perscrutand’ & capiend’, prædict’ *Willielmus de Kellawe*
 “ simul, &c. cepit denarios prædict’, qui fuerunt in domo & propriâ
 “ custodiâ prædicti *Willielmi de Heberne* & contra voluntatem suam,
 “ & etiam pro eo, quod videtur curiæ, quod prædict’ *Willielmus de*
 “ *Heberne* omninò esset sine recuperare, quoad denar’ suos prædict’,
 “ nisi esset versus præfat’ *Willielmum de Kellawe*, &c. qui prædictos
 “ denarios in formâ prædictâ cepit & asportavit, consideratum est,
 “ quod prædict’ *Willielmus de Heberne* recuperet versus prædict’ *Wil-*
 “ *lielmum de Kellawe* prædictos denarios & dampna sua, quæ taxantur
 “ ad c. s. & idem *Willielmus de Kellawe* committatur gaolæ, &c.
 “ prætextu cujus recordi ad sectam prædicti *Willielmi de Kellawe*, as-
 “ ferentis errores & defectus in prædictis recordo & processu interesse,
 “ mandatum fuit episcopo *Dunelm.* quod scire fac’ prædicto *Willielmo*
 “ *de Heberne*, &c. qui non venit.

“ Ideo processum est ad examinationem recordi per ejus defaultum,
 “ & assignat hos errores; primùm, quod nihil fecit contra pacem
 “ regis, nec denarios illos cepit vi & armis, maximè cum prædictus
 “ *Willielmus de Heberne* juratas fuit stare ordinationi prædictæ, &
 quod

“ quod ipse *Willielmus de Kellawe* per sacramentum præhibitum in-
 “ junctus fuit scrutari & denarios prædictos capere; & non est con-
 “ sonum, quod dictus *Heberne* recuperaret prædictos denarios &
 “ dampnum contra assensum & juramentum suum proprium, nec
 “ quod ipse *Kellawe* committeretur goalæ.

“ Item in hoc quod justic’ fundaverunt judicium suum, quod dictus
 “ *Heberne* non posset habere suum recuperare de denariis prædictis,
 “ cum illud habere posset directè versus communitatem vir-
 “ tute ordinationis & concessionis prædictarum, &c. ob quos [58]
 “ errores hic in judicio recitados consideratum est, quod erronicè in
 “ primo judicio processum est, & quod idem *Kellawe* a gaola deli-
 “ beretur, & totus processus evacuetur, &c.”

In Pasch. 15. Rot. 17. “ Pater, quod Scoti cum hominibus de
 “ *Rippon* similiter concordârunt pro mille marc’, nè villa combu-
 “ retur.”

Nota, this was an act done for the security of the country in a time of actual war and invasion by enemies, and therefore rendered that by-law and the execution thereof justifiable by reason of that necessity, which would hardly have done it in time of peace. 2. But that, which this record principally evidenceth, is, that such a supply of the king’s enemies upon such a necessity in a time of war, and to prevent the devastation of the country, was not taken at all to be an adhering to, or treasonable aiding of the king’s enemies.

[4. Blackf. Com. ch. ii. p. 31.]

CHAP. X.

Concerning the offense of high treason, the person against whom committed, and the reason of the greatness of the offense; and touching alligance.

HAVING premised these general observations relating to all crimes, that are capital, and their punishments, I shall now descend to consider of capital crimes particularly, and therein first of high treason.

And yet, before I descend to the particulars thereof, I shall premise also some things in general touching alligance, since the specification

of this offense consists principally in this aggravation, that it is *contra ligeantiae suæ debitum*.

[59] The offense of high treason is an offense, that more immediately is against the person or government of the king; and the greatness of the offense, and the severity of the punishment is upon these two reasons.

1. Because the safety, peace, and tranquillity of the kingdom is highly concerned in the safety and preservation of the person, dignity, and government of the king; and therefore the laws of the kingdom have given all possible security to the king's person and government under the severest penalties.

2. Because as the subject hath his protection from the king and his laws, so on the other side the subject is bound by his allegiance to be true and faithful to the king; and hence all indictments of high treason run *proditorie*, as a breach of the trust, that is owing to the king; *contra ligeantiae suæ debitum*, against that faith and allegiance he owes to the king, and *contra pacem domini regis, coronam, & dignitatem ejus*.

And hence it is, that if an alien enemy come into this kingdom hostilely to invade it, if he be taken, he shall be dealt with as an enemy, but not as a traitor, because he violates no trust nor allegiance; resolved in the lord *Herise's* case. *Co. P. G. cap. 1. p. 11. 7 Co. Rep. 6. a. Perkin Warbeck's case.*

But if an alien, the subject of a foreign prince in amity with the king, live here, and enjoy the benefit of the king's protection, and commit a treason, he shall be judged and executed, as a traitor; for he owes a local allegiance. *7 Co. Rep. 6. the case of Stephano Ferrara (a) a Portugueze*; and the indictment shall not run *contra naturalem dominum*, but *contra dominum suum*, and conclude *contra ligeantiae suæ debitum*; and such an alien was compellible to take the oath of allegiance in the leet. *2 Co. Instit. p. 121 (b).*

If a merchant, subject of a foreign prince in hostility with our king, come hither, after the war begun, without the king's licence, or safe-conduct, such a person may be dealt with as an enemy, *viz.* taken, and ransomed. *Mag. Chart. cap. 30 (c).*

[60] By that statute merchants of an hostile country found in this realm at the beginning of the war shall be attached with-

(a) And *Emanuel Lewes Tinoco. Hill. 36 Eliz. Dyer 145.*

(b) *Miroir de justice, cap. 5. §. 1. n. 6.*

(c) *2 Co. Instit. 58.*

out harm to their body or goods, till it be known, how the *English* merchants are used in the hostile country; and if the *English* merchants be well used there, theirs shall be likewise used here; so that in this case such merchants, tho alien enemies, have the benefit of the king's protection, and so owe a local allegiance, which if they violate, they may be dealt with as traitors, not as enemies, for they have the advantage of the king's protection, as well as his other subjects; yea, it seems also, that if the subject of a foreign prince lives here as a private man, and then war is proclaimed betwixt our king and that foreign prince, and yet that alien continues here in *England* without returning to his natural sovereign, but under the cover and protection of the king of *England* commits a treason, he shall be judged and executed as a traitor; for by continuing here he continues the owning of his former local allegiance.

Yet for the greater security in the times of hostility between this and foreign kingdoms, especially that of *France*, there went out precepts under the great seal to arrest all those of that hostile kingdom, until they gave surety, *quod se bene gerent erga regem, & quod sua bona non transferent sine licentiâ regis, & quod literas aut nuncios non mittent ad partes externas, nec aliquid contra pacem attemptabunt.* Rot. Vaseon. 18 E. II. M. 24, 23 & 21. Dorso. And sometimes those aliens were constrain'd actually to swear fealty to the crown of *England* in the times of hostility, and thereby to superadd an actual allegiance to that local allegiance, which they had being under the king's protection as subjects, tho in truth they were the natural subjects of the hostile prince. Pat. 14. H. 6. part. 2. m. 34. & 35. and, if they refused, were either imprisoned, or expelled the kingdom. Vide infra cap. 15.

And upon the same account it is, that tho there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise treason against his person; and therefore, altho the true prince regain the sovereignty, yet such attempts against the usurper in compassing his death have been punished as treason, unless they were attempts made in the right of the rightful prince, or in aid or assistance of him, because of the breach of ligeance, that was temporarily due to him, that was king *de facto*; and thus it was done 4 E. 4. 9 E. 4. 1 (d). tho' H. 6. was declared an usurper by act of parliament 1 E. 4. and

(d) It was not done in this case, but only it is said by the counsel, that it may be done.

therefore king *Edward IV.* punished *Ralph Grey* with degradation, as well as death, not only for his rebellion against himself, but also *pur cause de son perjury & doubleness, qu'il avoit fait al roy H. 6. 4 E. 4. 20.*

And because high treason is said to be *contra ligeantiæ debitum*, it will not be amiss to premise something touching alligance and its kinds, referring myself to *7 Co. Rep. Calvin's case*, in relation to what is here omitted touching it.

Alligance therefore due to the king is of two kinds: 1. Original, virtual, and implied. 2. Express, and declar'd by oaths or promises.

The virtual or implied alligance is that, which the subject owes to his sovereign antecedently to any express promise, oath, or engagement: this is that, which the *Custumer de Normandie* mentions *cap. 13. Alliance & la loyaulte de tous ses homes de toute la contree, par quoy ils sont tenus a lui donner conseil & ayde de leurs propres corps contre toutes personnes qui peuvent vivre & mourir & soy garder de lui nuire en toutes choses ne de soutenir in aucune chose la partie de ceulx qui parlent contre luy.*

And from the breach of this original ligeance ariseth, the crime of treason, tho the person committing it never promised or swore faith or alligance to his prince: for as the king by the very descent of the crown is fully invested with the right of sovereignty before his coronation, (which is only a magnificent solemnity attending that, which is before settled in the prince by the descent of the crown,) so the subject is bound to his king by an intrinsic alligance before the superinduction of those express bonds of oath, homage, and fealty, which were instituted for the better securing thereof.

[62] And this alligance is either natural from all that are subjects born within the king's alligance; or local, which obligeth all, that are resident within the king's dominions, and partake of the benefit of the king's protection, altho' strangers born.

The breach of this primitive or virtual alligance is that, which is called high treason; what shall be said of breach of this alligance, so as to make a person guilty of treason, shall be shewn hereafter.

The express or explicit alligance consists in certain promises, oaths, or professions attesting and witnessing that alligance, and instituted for the farther security thereof: and they are of two kinds; first, those, which were antiently instituted by the Common law, namely the oath of fidelity and alligance, and the profession of lige homage; and such, as are instituted by act of parliament, namely the oath of supremacy

supremacy instituted by the statute of 1 *Eliz.* (e), and the oath of obedience instituted by the statute of 3 *Jacobi* (f). Something I shall say of all these.

The oath of fidelity or fealty is of two kinds: 1. That which is due by tenure, whether of the king, or of mesne lords, which is *ratione feodi vel vassalagii*, and hath a special relation to the lands so held, and is set down by *Lyttleton*, §. 19. "Hear ye, my lord, I shall be faithful and loyal, and faith to you shall bear for the tenements, which I claim to hold of you, and I shall lawfully do to you the customs and services, which I ought to do at the terms assigned. *So help me God.*"

Touching this feudal fealty, or fealty by reason of tenure, I have not much to do in this place. The other kind of fealty is that oath, which is called *fidelitas ligea*, or *alligeance*, and performed only to a sovereign prince, and therefore regularly ought to be performed by all men above the age of twelve years, whether they hold any lands or not. The tenor of this oath according to *Fleta*, *Lib. III. cap.*

16. (g), runs thus: "Hoc auditis, circumstantes, quod [63] fidem regi portabo de vita, & membris, & terreno honore, & arma contra ipsum non portabo: sic me Deus, &c." -

According to *Britton*, who wrote about 5 *E. 1 cap.* 29. (which is also mentioned in *Calvin's case*, 7 *Co. Rep.* 6.) the common form of the oath of alligeance taken in leets runs thus: "Ceo oyes vous *N.* bailife, que jeo *A.* de ceo jour en avaunt terray leal, & leale nostre seignieur *E.* roy d'Angleterre, & a ses hoires, & foy & lealte lui porteray de vie, & de membre, & de terrien honour, & que jeo lour mal, ne lour damage, ne sayeray, ne orray, que jeo ne le fendray a mon poyer: si moy eyde Dieu & les Seyntz." This is the form of the antient oath of alligeance, or fidelity to the king, and as it is used at this day; and he that is minded to see the antiquity of it, may read thereof 7 *Co. Rep.* 7. *Calvin's case*, *Spelman's Gloss. Titulo Fidelitas*, which carry it up as high as king *Arthur*; more particularly it was established by the laws of the Confessor (h), and by the

(e) cap. 1.

(f) cap. 4. [vide 7 *Jac.* I. cap. 2. & 6. 13 *Car.* II. St. 2. cap. 1. 13. & 14 *Car.* II. cap. 3. & 4. 25 *Car.* II. cap. 2. 30. *Car.* II. St. 2. cap. 1.] But these oaths are abrogated by 1. *W. & M. Sess.* 1. cap. 1 & 8. and new ones appointed in their room; see 1 *W. & M. Sess.* 2. cap. 2. §. 8. and 3 *W. & M. Sess.* 2. 13 *W.* 3. cap. 6. 1 *Anne*, cap. 22. 4 *Anne*, cap. 8. 6 *Anne*,

cap. 7, 14, 23. 1 *Geo.* 1. cap. 13, &c.

(g) *feft.* 22.

(h) l. 35. but these laws are evidently spurious, and seem to be the composition of some lawyer after the reign of *William* II. Vide *Hicellii Dissert. Epist.* p. 95. and even in the best MS. copies of these laws the legendary account of king *Arthur* is omitted.

laws of king *William I.* quod vide in *Spicilegiis Seldeni ad Edmerum lege 52 (1)* “Statuimus, ut omnes liberi homines fœdere & sacramento affirmant, quod intra & extra universum regnum Angliæ *Willielmo* regi domino suo fideles esse volunt, terras & honores illius omni fidelitate ubique servare cum eo & contra inimicos & alienigenas defendere (k).”

And herein the prudence of the Common law is observable; the antient oath of alligance, 1, was short, and plain, not intangled with long and intricate clauses or declarations, but the sense of it is obvious to the most common understanding; and yet, 2. it is comprehensive of the whole duty of the subject to his prince, and therefore hath obtain'd for above six hundred years in this kingdom; and if any difficulties should occur in the sense or extent thereof, length [64] of time and long experience and practice hath sufficiently expounded it.

I shall subjoin some observables concerning this oath, which indeed explain that implied and virtual alligance, whereof before.

1. By whom this oath is to be taken: It is to be taken by all persons above the age of twelve years, whether denizens or aliens, 2 *Co. Instit. p. 121.* except women, earls, prelates, barons, and men of religion, according to *Britton, cap. 12.* which exception is not to be absolutely and universally understood; for all persons above the age of twelve years are bound to take this oath of alligance, except women, as shall be shewn, but not in the same manner or place, as others; but because regularly this oath was to be taken in the leet, or at least in the sheriff's turn, which is in nature of a leet, where earls, barons, prelates, and men of religion were not bound to do their suit, therefore by the statute of *Marlbr. cap. 10.* is this exception added: but yet at other times and in other places men of religion and noblemen were to take it: as shall be shewn.

It differs from the oath of fealty perform'd to the king by tenure, for that includes somewhat more, and somewhat less; and according to *Britton, cap. 68. (1)* runs thus when perform'd to the king: “*Ceo oyes vous bone gents qe jeo J. S. foy a nostre seignior le roy Edward por- terai de ceo jour en avaunt de vie & de membre, de cors & de chateux, & de terrene honor, & les services qe a lui appendent de fees & de te-*

(1) *Vide Leg. Anglo-Sax. Edit. Wilkin, p. 228. Edit. Lambard, p. 170.*

(k) *Vide assisas Henrici regis factas apud*

Clarendon & renovatas apud Northampton, Howeden, p. 314. Edit. Savil.

(l) § 479.

“ nements, que j'eo teigne de lui, leaument les ferray as termes dues a mon poer : si moy ayde Dieu & les Scyntz, &c.”

Now, besides this oath of fealty or alligance to the king, there were antiently certain oaths administered to persons of a different age; but these have been long disused, as namely that, which *Britton* mentions *cap. 12. viz.* that all above the age of fourteen years (*m*) should swear to be true and faithful to the king, and that they should not be felons nor assenters to felons, excepting men of religion, women, clerks, knights, and their eldest sons (*n*); and of the like nature was that oath appointed by king *Henry III.* to be taken by all men above fifteen years, consisting of divers particulars in order to the preservation of the peace, and mention'd at large by *Bracton, Lib. III. Tract. 2. cap. 1. de Corona*; both which it seems were temporary provisions for preservation of the peace, and therefore administered to persons above fourteen and fifteen years, and differd from this settled oath of alligance above mentioned.

2. What kind of oath of fidelity this is: As there is *homagium ligum*, and *homagium simplex*, so there is *fidelitas ligea* and *fidelitas simplex*; this, that is perform'd to the king, is *fidelitas ligea*, and differs from the later, 1. In that this is perform'd to a king, the other to a mesne lord. 2. This is perform'd without relation to any tenure of lands. 3. This is without exception of the fidelity to any person, that is always *salvâ fide & ligentia domini regis*.

Yet there seems to be a double kind of *lige fealty*: as where there is a prince, that is subordinate to another, and yet hath *jura summi imperii* over his subjects: such was the king of *Scots*, whilst in some times of *Edward I.* and *Edward III.* he was in subjection to the crown of *England*; such was the prince of *Wales* before the conquest thereof by *Edward I.* and the full union of it to the crown of *England*; and thus it was in many investitures made formerly by the kings of *England*: for instance *anno 35 H. 3.* when that king gave to his son *Edward* the principality of *Gascoigne* in *France*, so that the great men of that country *fecerunt ei homagium & fidelitatis juramentum*; yet

(*m*) This probably should be twelve years. See 2 Co. *Instit.* 147. *Vide supra in notis, p. 24.*

(*n*) This exception seems not to relate to the oath, but to the being in a *decenna* or tithing. The whole passage runs thus: “ Volons nous, que tres tous ceux de xiiii

ans de southe nous facent le serement, que ils nous ferrount fealx & leaux, & que ils ne ferrount felons, ne a felons assentaunts, & volons, que toutz soient en dizeyne, & pievys par descyners, save gentz de religion, clers & chivalers & leurs firz cyne, & femes.”

Matthew Paris (o) tells us, that *dominus rex tamen sibi retinuit principale dominium, scilicet ligeantiam.*

The like was done by *E. 3.* when *Rot. Vascon. 36 E. 3. m. 18.* the king had given to the *Black Prince* the principality of *Aquitain* with a regal jurisdiction, viz. *merum & mixtum imperium*, so that [66] in relation to the subjects of *Aquitain* he was in nature of a sovereign; yet the king not only reserved *homagium ligeum* to be perform'd to him by the prince, but also reserved his own sovereignty, viz. *Dominio directo & superioritate nobis semper specialiter reservatis*: by reason whereof the king did not only substitute his delegates or judges *de la sovereignty et de resort* to receive appeals from the prince, as appears by *Mr. Selden's Tit. Honoris, part 2. cap. 3. §. 4.* but was intitled to a superior alligance of all the subjects of *Aquitain*: so that here were two alligances; one due to the prince, which was qualified and restrained, *salvâ fide regis*; and the other absolute, which was due to the king as supreme.

Again, when in the year 1170. *Hcn. 2.* by consent of parliament (p), as it seems, (for otherwise it could not be done) made his eldest son king of *England*; so that there was *rex pater*, and *rex filius*, yet he reserved to himself the supreme alligance of all his subjects: "Et in crastino coronationis illius rex pater fecit *Willielmum* regem Scotorum, & *Davidem* fratrem suum, & comites, & barones regni devenire homines novi regis, & jurare ei fidelitatem contra omnes homines, salvâ fidelitate suâ;" Quod vide apud *Hoveden* sub eodem anno (q), and the instrument itself at large apud *Brompton, p. 1104. (r)*: "Hæc est conventio & finis, quæ *Willielmus* rex Scotiæ fecit cum domino suo *Henrico* rege Angliæ filio *Matildis* imperatricis, viz. quod dictus *Willielmus* rex Scotiæ devenit homo ligeus domini regis Angliæ contra omnem hominem de Scotia, & de omnibus terris suis aliis, & fidelitatem ei fecit, ut ligeo domino suo, sicut alii homines suo principi facere solent; similiter fecit homagium *Henrico* filio suo, & fidelitatem, salvâ fidelitate domini regis patris sui, &c. Comites & barones de terrâ regis Scotiæ, de quibus dominus rex Angliæ homagium habere voluerit, facient ei homagium contra omnem hominem, & fidelitatem, ut ligeo domino suo,

(o) p. 845.

(p) *Hoveden* sub anno 1170, *Brompton, p. 1061.*

(q) *Et* sub anno 1175.

(r) *Et in libro rubro scaccarii, fol. CLXVI, & Rymer's Fœdera, Vol. 1. p. 39, ex magno rotulo penes Camerar'.*

“ sicut alii homines sui ei facere solent, & Henrico regi filio suo & hæredibus suis, *salvâ fidelitate* domini regis patris sui.”

Here was *first* the supreme king, namely *rex pater*, who did not oust himself of his regality, as some have mistaken, but had the sovereignty still, for he reserved his ligeance from the new king, and from all his subjects; yea, and in farther testimony thereof the *rex filius* in the year 1175. did his father lige homage, and swore alligance *contra omnes homines*, as appears by *Hoveden*. *Secondly*, Here is a subordinate king, *rex filius*, who, tho in relation to his father he was a subject, yet in relation to his subjects, and particularly to the king of *Scots*, was a sovereign. *Thirdly*, Here is yet another subordinate king, *William* the king of *Scots*, who was a sovereign in relation to his subjects; and altho there was an alligance or *fidelitas ligea* due by the subjects of *Scotland* to their king *William*, yet it was *salvâ fidelitate* to the kings of *England*, father and son; and tho there was a lige fealty due to *rex filius*, yet it was *salvâ fide regis patris*; but the fidelity or alligance to the *rex pater* was purely *fidelitas ligea*, for it had no exception.

3. The third observable upon this oath of alligance is, that it is not only applicable to the politic capacity of the king, but to the person of the king, as well as to his office, or capacity; and for the misapplication of the alligance to the regal capacity or crown, exclusive of the person of the king, among other things the *Spencers* were banished. *Vide Judicium inde in Veteri Magnâ Chartâ & 7 Rep. 11. Calvin's case*, for the oath is to be applied to the person of the king, as well as his crown.

4. That in all oaths of fealty, as likewise in the profession of homage to any inferior or subordinate lord or prince, it must be *salvâ fide & ligeantiâ domini regis*; and to omit *this saving* is punishable in such lord: see for this the notable Record of 6 E. 1. against the bishop of *Exeter*. *Co. Litt. §. 85. (f)*, and it is no more than is used in other kingdoms. *Vide Spelm in titulo Fidelitas*. The emperor *Frederic Barbarossa* in the year 1152. made a law, that within his empire *in omni sacramento fidelitatis imperator nominatim excipiat*, which [68] obtained presently the like observation in all other countries, and accordingly is the *Customs de Normandy, cap. 29 & Glossa 2 da. Ibidem*.

5. That tho there may be due from the same person *subordinate* alligances, which tho they are not without an exception of the fidelity due to the superior prince, yet are in their kind *sacramenta ligea fidelitatis*, or subordinate alligances, yet there cannot, or at least should not be two or more co-ordinate absolute ligeances by one person to several independent or absolute princes; for that lawful prince, that hath the prior obligation of alligance from his subject, cannot lose that interest without his own consent by his subject's resigning himself to the subjection of another; and hence it is, that the natural-born subject of one prince cannot by swearing alligance to another prince put off or discharge him from that natural alligance; for this natural alligance was intrinsic and primitive, and antecedent to the other, and cannot be devested without the concurrent act of that prince to whom it was first due: indeed the subject of a prince, to whom he owes alligance, may entangle himself by his absolute subjecting himself to another prince, which may bring him into great straits; but he cannot by such a subjection devest the right of subjection and alligance, that he first owed to his lawful prince (1).

It appears by *Bracton, Lib. V. cap. 24. (u)*, that there were very many that had been antiently *ad Fidem regis Anglæ & Franciæ*, especially before the loss of *Normandy*; such were the *comes marescallus* that usually lived in *England*, and *M. de Feynes manens in Francia*, who were *ad fidem utriusque regis*, but they ever ordered their homages and fealties so, that they swore or professed ligeance or lige homage only to one; and the homage they performed to the other was not purely *lige homage*, but rather *feudal*, as shall be shewn more hereafter: and therefore when war happened between the two crowns, *remaneat personalitèr quilibet eorum cum eo, cui fecerat ligeantiam, & faciat* [69] *servitium debitum ei, cum quo non steterat in personâ*, namely, the service due from the feud or fee he holds: but this did not always satisfy the prince, *cum quo non steterat in personâ*, but their possessions were usually seized, and rarely or not without difficulty restored without a capitulation to that purpose between the two crowns. *Vide Claus. 15 H. 3. m. 21. pro Henrico de la Vagor, Claus. 20 H. 3. m. 1. pro Simone Montford, and Placita Parl. 18 E. 1. (x)*, the petition of the earl of *Ewe* in *France* for the castles of *Hasting* and *Tikehull* is

(1) The case here put by our author is evidently meant of a private subject's swearing alligance to a foreign prince, and has no relation to a national withdraw-

ing alligance from a prince, who has abdicated the throne.

(u) *Traſtat 5. De Exceptionibus.*

(x) *Ryſer's Plac. Parl. p. 20.*

answered, "*Quandocunque placuerit domino regi Franciæ terras & tenementa hominibus istius regni restituere, quæ sua fuerunt, in potestate ipsius domini regio, quod ipse dominus rex Angliæ de castris & terris prædictis prædicto comiti reddendis faciet, quod de consilio suo videtur esse faciendum.*"

But sometimes it fell out, that the inconsiderateness of persons carried them upon presumptions of some advantages to make a ligeance to both princes; and then the successes of either side rendered them within the penalty of the breach of alligance to the adverse party.

Peter Brian had the earldom of *Richmond* here in *England*, and held it of the crown of *England*, and the duchy of *Britany* in *France*, which was held of the crown of *France*, (tho *Brompton* tells us, that by an agreement between *Richard I.* and the king of *France* sub anno 1191. (y), the feigniory thereof was bestowed upon the king of *England*) he was an homager of the crown of *France*, and upon some agreement between him and the king of *England* touching a war with *France*, he came into *England*, and, as it seems, swore fealty to the crown of *England*; but afterwards he fell in again with the king of *France*, and betrayed the army of the king of *England*, and per inter-nuncios reddidit Anglæ regi homagium; but he lost himself with both crowns: the king of *France* disposed of the duchy of *Britany* to his son, and the king of *England* gave the earldom of *Richmond* to *Peter de Sabaudia*; tho upon an exchange he afterwards took it back, and restored it to a son of the former earl. *M. Paris* sub anno 1234. p. 406. and *Claus.* 19 H. 3. m. 17. dorf. where in a letter by the king to the pope the whole story is related. [70]

After this, *John de Brene* otherwise *Montford* descended from the above-mentioned *Peter*, falling in with king *Edward III.* after his assumption of the title of *France*, was restored to the duchy of *Britany* and earldom of *Richmond*; and *Claus.* 19 E. III. p. 1. m. 14. dorf. did his lige homage to king *Edward III.* as king of *France* in these words: "*Monseigneur, jeo vous reconnoisse droiturell roy de France, et a vous, come a mon seignior liege et droiturell roy de France, face mon homage pur le dit dutchy de Bretagne, quel jeo claime tener de vous, mon seignior, et deveigne vostre home lige de vie, et de membre, et de terrene honor, a vivre et morir countre tous gents.*" His son *John de Montford* falling

(y) Vide *Brompton*, p. 1196.

back to the king of France lost the earldom of *Richmond* by judgment in parliament 7 R. 2. but entered *de recordo. Rot. Parl. 14 R. 2. n. 14.*

These difficulties beset those, that were *ad fidem utriusque regis*; they were sure to be losers on one side, and sometimes on both sides.

And thus far touching the oath of alligance or fealty.

II. The second expresse obligation of the subject to his prince is that of homage.

This, tho it be no oath, but a very solemn profession of duty, yet it hath always fealty performed with it, and after it; for homage draws with it fealty, which in case of simple homage done to a subject is with the same exceptions as the homage is; but in case of *homagium ligeum* it hath attending upon the performance thereof *fidelitas ligea*, or alligance.

The kinds of homage are three: 1. *Simple*, as that which is performed to a mere subject by virtue of his tenure. 2. *Homagium ligeum*. 3. *Homagium mixtum*.

1. The simple homage, which is performed barely by reason of tenure, is that which *Littleton* describes both in the words and ceremonies, *Lib. II. cap. 1. (z)*, wherein always there is an exception of the faith due to the king.

2. *Homagium ligeum*, which is thus: “[71] “Jeo deveigne vostre
“home de ce jour en avant de vy et membre, et de terrene
“honor, et a vous serai foyal et loyal, et foy a vous portera contre
“touts gents, qe viure point, ou merier;” this is the form, that *Fleta* gives *Lib. III. cap. 1. e. 1.*

The ceremony is the same when done to the king, as when it is performed to a mesne lord, *Rot. Parl. 18 H. 6. n. 58.* the ceremony of kissing the king was dispensed with by reason of the danger of contagion in time of plague.

And touching this homage these things are observable:

1. It differs from the oath of alligance, in that this is only by a profession; but alligance is by an oath, tho the oath of alligance also accompany it.

2. It differs in this, that, whereas all men above the age of twelve years are to take the oath of alligance, whether they hold land, or not; yet lige homage is not to be performed but by three sorts of persons: 1. Such as hold of the king by homage, which tho it be performed in respect of tenure, yet it is *homagium ligeum*, because per-

formed to the sovereign, and without any exception of the homage due to inferior lords. 2. Such as are dukes, earls, or viscounts, or barons, tho they hold nothing of the king, yet at the coronation they perform a lige homage; the tenor whereof runs thus: "I become your liege man of life and limb, and of earthly worship, and faith and truth I shall bear unto you to live and die against all manner of folk: *so God me help!*" and then he toucheth the crown, and then toucheth the ground; *nota*, it refers not to any lands. 3. By prelates or bishops; and this is not only at the coronation of the king, but after their election, and before the restitution of their temporalities. *Vide Statute 25 H. 8. cap. 20.*

Antiently the clergymen quarreled at the performance of homage to the prince; but by the constitutions of *Clarendon* set down by *Matthew Paris*, p. 101. they were bound to perform it, and it hath been hitherto practised; only to gratify them in something antiently it was indulged in this manner, *viz.* "*Faciet electus homagium & fidelitatem regi, sicut ligeo domino suo, de vita, & membris, & de honore terreno, salvo ordine suo, priusquam consecratur;*" and, [72] tho I do not find this *salvo ordine* inserted in after-times, yet there hath been a temperament added to that homage performed by clergymen, which it seems satisfied their scruple, their homage running thus: "I do you homage, and faith, and truth bear unto you, our sovereign lord, and to your heirs kings of England, and I shall do, and truly acknowledge the service of the lands, which I claim, I hold of you in the right of the church; as God me help."

And this is fealty, as well as homage, for it is accompanied with an oath, tho it hath the solemnity of great flexion, and kissing the king's cheek.

3. The agreements and differences between that homage, that is simply feudal, or by reason of tenure only, and this homage, that is *homagium ligum*, are these: 1. Because tho homage is not to be done by any, but those that hold by that service, or by the nobility, or clergy, as before: yet when done to the king, it becomes *homagium ligum* in respect of the person to whom it is performed. 2. If it be homage done to the king, it is *homagium ligum*, and hath no exception of homage due to others. 3. But principally the difference is in the effect of it, which is excellently described by *Terrien* in his Comment upon the *Customs of Normandy*, Lib. III. cap. 1. Feudal homage, that is simply such, binds only *ratione feodi*; therefore if the

homager

homager alien, or deliver to his lord his fief, or fee, he is discharged of the obligation; but lige homage, tho it may be performed by reason of the fee in its kind or species, yet it principally binds the person; and tho the fief itself be aliened, or transferred to another, yet the obligation of lige homa^ge continues.

3. There are certain homages, that are mixt, and partly lige, and partly not; and they are of two kinds: 1. When the homage is performed to a prince, that is sovereign in relation to his subjects, yet owes a subjection to some other prince; this was the case of the prince of *Wales*, and the king of *Scots* before mentioned, the homage, that they performed to the king of *England*, was simply lige homa^ge, as we may read before, and particularly in *Walsingham's Ypodigma Newstric*

[73] *sub anno 1291. (b),* where the tenor of the homage of *John de Baliol* king of *Scots* is entred in hæc verba: “*Domine Eduarde rex Angliæ, superior domine regni Scotiæ, ego Johannes Baliol rex Scotiæ recognosco me hominem vestrum ligum de toto regno Scotiæ, & omnibus pertinentiis, & hiis, quæ ad hoc spectant; quod regnum meum teneo & de jure debeo & clamito tenere hæreditariè de vobis & hæredibus vestris regibus Angliæ, de vitâ & de membris, & de terreno honore contra omnes homines, qui possunt vivere & mori.*”

I mention this homage of the king of *Scots* not to revive the antient controversy touching the subordination of that kingdom to this, for that difference hath been long settled and at peace; but only to apply my instances of the various sorts of homages performed by sovereign princes.

But the homage, that was performed by their subjects to them, was partly lige homage, and partly not; it was lige homage as to between the king of *Scots* and them; and as to all persons in the world, except the king of *England*; for the king of *Scots* and prince of *Wales* had the rights of sovereignty *jura imperii* as in relation to their subjects and all others, but the king of *England*.

But in relation to the king of *England*, the homage performed to the prince of *Wales* or king of *Scots* was not lige homage; for there was an exception either expressed or implied at least *salvâ fide domini regis Angliæ*, as appears plainly above.

2. Another instance of a mixt homage is, when a sovereign prince hath a vassalage, or possession in another absolute prince's dominion: this was the case of the king of *England*, in relation to the lordships

and feignory he had in *France*, as *Aquitaine*, *Anjou*, and *Picardy*, &c. which were all held of the crown of *France*: these descended to king *Edward III.* the king of *France* required lige homage from the king of *England* for these territories; the king of *England*, as king of *England*, had no dependence on *France*, and therefore for the more caution performed to the king of *France* for the dutchy of *Aquitaine* and other his possessions in *France* a general homage by these words, "*Nous entromys in l'homage de roy de France per* [74] "*ainfi, come nous et nous predecessors dues de Guyen estoient jades enterent en l'homage des royes de France pur temps esteant;*" and altho afterwards a settled form of homage was prescribed in this case (*c.*), yet most evident it is, that it was not *homagium ligeum*, but only a *feudal homage* relative to those territories of the crown of *France*, but but not at all with any relation to the person or crown of the king of *England*.

For the king of *England* had a double capacity, one as an absolute prince, that owed no subjection to the crown of *France*; nor to any other king, or state in the world; in this capacity he neither did nor could do homage to the king of *France*; he had another capacity, as duke of *Aquitaine*, and in that capacity he owed a *feudal*, but not *personal* subjection to the crown of *France*; and in this latter capacity only, and as a different person from himself, as king of *England*, he did the homage, which was in truth no *lige homage*, but a bare *feudal homage*, which I rashly mention to rectify the mistakes of those that call it a *lige homage*.

But by the way I must observe, a *feudal homage*, as duke of *Aquitaine*, lasted not long; for in year 3 the king of *England* assumed the title of king of *France* together with the arms of *France* by hereditary descent, which style his successors have ever since used.

And indeed the name of lige homage from him, that was king of *England*, to the king of *France*, tho purely in the capacity of duke of *Aquitaine*, founded so ill, that when a peace was in treaty between the king of *France* and *Richard II.* viz. *Rot. Parl* 17 R. 2 n. 16. the entry is made, "*Fait a remember qe le roy, seigneurs, chivalers, et justices assenterent en cest parlement a le pees, purensi qe nostre dit seigneur le roy ne face homage lige, et sauant tous dits le liberty de*

"*la person nostre seigneur le roy, et de son royaume de Angleterre et de ses liges du dit royaume,*" and with power to resort to the title of the crown of *France*, in case of breach of league by the king of *France*: this is farther amplified by the speech made openly by the

[75] speaker of the house of commons. *Ibid.* n. 17. The homage here meant was with relation to the duchy of *Aquitaine*, which upon this treaty was to be delivered to the king of *England*.

And thus much touching these two securities of the subjects alligance to the king of *England*, wherein I have been the larger, because many things occur in this business, that give some light to antiquity, and do not so commonly occur, and because the great brand of high treason is, that it is a violation or breach of that sacred bond from the subject to his king, commonly called alligance, for the security whereof this oath of alligance and lige homage were instituted, and effectually expounds the obligation, and duty of that alligance, that is due from the subject to the king.

I shall now only mention those two eminent oaths of supremacy, and obedience, tho there were besides them other temporary oaths relating to the crown, as that of 25 *H. 8. cap. 22.* 26 *H. 8. cap. 2.* 28 *H. 8. cap. 7.* 35 *H. 8. cap. 1.*

The supremacy of the crown of *England* in matters ecclesiastical is a most unquestionable right of the crown of *England*, as might be shewn by records of unquestionable truth and authority, but this is not the business of this stage; yet nevertheless the pope made great usurpations and incroachments upon the right of the crown herein.

King *Henry VIII.* in the twenty-fifth year of his reign having pared off those incroachments in a good measure by the statute of 25 *H. 8. cap. 19, 20, 21.* in the twenty-sixth year of his reign the supremacy in matters ecclesiastical is rejoined and restored to the crown by the statute of 26 *H. 8. cap. 1.*

The papal incroachments upon the king's sovereignty in causes and over persons ecclesiastical, yea even in matters civil under that loose pretense of *in ordine ad spiritualia*, had obtained a great strength, and long continuance, notwithstanding the security the crown had by the oaths of fealty and alligance; so that there was a necessity to unrivet those usurpations by substituting by authority of parliament a recognition by oath of the king's supremacy as well in clauses ecclesiastical as civil.

And therefore after those revolutions, that happened in the life, and on the death of *Henry VIII. Edward VI. and queen Mary, queen Elizabeth* coming to the crown, the oath of supremacy was enacted by the statute of 1 *Eliz. cap. 1.* for the better securing of the supreme authority of the crown of *England* as well in matters ecclesiastical as temporal; which I shall not here repeat, but reserve the same, and what is proper to be said touching it, to a particular chapter hereafter (*d*).

Afterwards the dangerous practices of popish recusants gave the occasions of enacting of the oath of obedience by the statute of 3 *Jac. cap. 4.* which I shall likewise refer to its proper place.

And thus far touching allegiance, and the securities of the same by the oath of allegiance, and the profession of lige homage.

See 4. *Blackf. Com. ch. vi. & Fost. Discourse on High Treason. p. 183 to 251, 397, 398, & 1 Hawk. P. C. c. xvii. of h. treason, p. 33 to 46.*

CHAP. XI.

Concerning treasons at the Common law, after their uncertainty.

HAVING shewn in the former chapter the kinds and bonds of fidelity and allegiance from the subject to the king, I come to consider of those crimes, that in a special manner and signally violate that allegiance, namely high treason.

At Common law the crime of high treason had some kinds of limits and bounds to it.

In the time of *Henry II. Glanvil*, who then wrote *Lib. IV. cap. 1 & 7.* tells us of four kinds of *crimina læsæ majestatis, viz. de morte regis, de seditione regni, de seditione exercitus regis*, and the counterfeiting of the great seal; for as to the counterfeiting of money, that came under the title of *Crimen falsi*, and the punishment thereof antiently was various; but of that particular hereafter.

Bracton, that wrote in the time of *Henry III. Lib. III. cap. 3.*
 “ *Siquis ausu temerario machinatus sit in mortem domini regis; vel ali-*

(*d*) Vide postea cap. 25.

"quid egerit, vel agi procuraverit ad seditionem (a) domini regis, vel exercitus sui; vel procurantibus auxilium & consilium præbuerit, vel consensum, licet id, quod in voluntate habuerit, non perduxerit ad effectum;" to which he adds counterfeiting of the seal and money; which, tho they come under *crimen falsi*, yet are reckoned by him among the *crimina læsæ majestatis*: tho in these old authors treason is sometimes expressed by the name of *sedition*, yet that word is too general and comprehensive of other offenses not capital, as well as of treason; and therefore a charge of sedition against the king, or of exciting sedition, or of speaking, writing, or doing any thing *seditionously*, doth not amount to a charge of treason; and therefore it was, that in the case of Selden and others, *Trin. 5 Car. B. R. (b)*, when upon an *habeas corpus* the parties were returned committed by the privy council by the king's command for stirring up sedition against the king, the prisoners were bailed in the king's court, because it amounted not to a charge of treason, for sedition in a true legal signification doth not import treason.

Fleta, who wrote in the time of Edward I. agrees almost verbatim with *Bracton*, viz. *Lib. I. cap. 20, 21 (c)*.

Britton, who made his book in the time also of king Edward I. reckons up treasons much in the same manner, yet makes some additions, *cap. 8. de treason*; "*Grand treason est a compasser nostre mort, ou dissheriter nous de nostre royaume, ou de fausser nostre seal, ou de countrefaire nostre monnoye, ou de la retoundre.*"

(a) In the case of Mr. Selden this is supposed to be the true reading, but in most of the MSS. of *Bracton* the word in this place is *seductionem*; altho in other places of the same chapter the word *sedition* is used: *Fleta* makes frequent use of the word *Seductio*, *Lib. I. cap. 20. § 1 cap. 21. §§ 1, 2, 3.* (the last of which places seems to be a direct transcript from *Bracton*) tho the word *sedition* is once used by him, *dicto capite, § 8.* and *Bracton* afterwards in this same chapter styles a traitor *seductor*.

Hengham, cap. 2. and *Glanvil, Lib. I. cap. 2.* both of them place *seditionem* in the rank of treasons, and so it was esteemed by the civil law. *Dig. Lib. XLVIII. tit. 4. ad leg. Jul. Majestatis, l. 1. tit. 19. De parnis, l. 38. § 2.* *Seditio* continued to be the technical word in legal proceedings (as will appear from several records hereafter quoted) until the terms *proditio* & *prodi-*

toria prevailed in this room, which last word must now be necessarily used in every indictment of treason. 3 *Co. Inst. 4, 12, 15.*

(b) *Mich. 5 Car. I. Vide Rushworth's Historical Collections, Vol. I. p. 679. Appendix, p. 18, &c. Seldeni Opera, Vol. VI. p. 1038.* The court was content, that they should be bailed, but said, that they ought to find sureties also for their good behaviour: they had their sureties ready for the bail, but they were remanded to the Tower, because they would not find sureties for the good behaviour. Selden was not bailed till May 1631. and not discharged from his bail till January 1634. *Vindictæ Mariæ Clausi. Seldeni Opera, Vol. IV. p. 1427, &c.*

(c) He does not rank the counterfeiting of the seal or of the coin among the *crimina læsæ majestatis* (as *Bracton* does), but among the *crimina falsi*, *Lib. I. cap. 22.*

And cap. 22. de appeles: "Sont ascunes felonies, que touchent nostre fuyt, et poient estre fuyt pur nous, sicome de vers nos mortels enemies, de nostre seal, de nostre corone, et de nostre monoye faulse."

Again; "En primes, c'est a dire, de appels de felonies, que poient estre faitz par nous, et nemye pour nous, sicome de trefon, et de compassement purveu vers nostre persone pour nous mettre a mort, ou nostre compayne, ou nostre pere, ou nostre mere, ou nous enfauntz, ou nous disheriter de nostre royaume, ou de trahir nostre hoste, tout ne soit tiel compassement mys en effect."

And in the latter end of the same chapter, "Et de fausyn de nostre seal, & de nostre monoye, purra lenseur appels pour nous en mesme la manere, et ausi del purgiser de nostre compayne, ou de nous filles, ou des norices de nos enfauntz: (d) En queux cases soit le jugement, de estre treyne, et pendu, &c." By these various expressions of Britton it appears, that the crime of high treason was very [79] uncertain; sometimes styled under the name of felony, sometimes had the punishment of petit treason applied to the crime of high treason, and some crimes mentioned, as treasons, which were not so taken by *Bracton*, or *Fleta*; and indeed in the farther pursuit of this argument we shall find, that at common law there was a great latitude used in raising of offenses into the crime and punishment of treason, by way of interpretation and arbitrary construction, which brought in great inconvenience and uncertainty.

In the parliament of 33 E. 1. now printed (e), which is likewise entered P. 33 E. 1 Rot. 22. North't. coram rege: *Nicholaus de Segrave* was impeached (f) de eo, quod "cum dominus rex nunc in ultimâ guerrâ suâ Scotiæ inter hostes & inimicos suos extitisset, & idem *Nicholaus de Segrave* homo ligeus tenens de ipsa domino rege per homa-

(d) According to the *Mirror of Justice*, p. 21, 22. high treason is committed, 1. Per ceux, que occident le roy, ou compassent de faire. 2. Per ceux, que luy disheritent de royaume, per [ceux que] trahissent un host, ou compassent de le faire. 3. Per ceux avoateor, que spargissent le semme le roy, le fiele le roy eigneisse legitime, avant ceo que elle soit mary, en la garde le roy, ou la nurice le ant le heire le roy.—These are the only offenses, which that treatise calls Crimes de Majesty. Counterfeiting of the king's seal or money is ranked under *Faussonery*, p. 29. And every species of petit treason is styled *Treason*, p. 30, as it is also by *Britton*, cap. 8.

It is one of the articles against *Roger Mortimer*, Rot. Parl. 4 E. 3 n. 1. 28 E. 3 n. 8. that he compassed to destroy les nurris le roy. If a private lord was injured in this manner, it was antiently petit treason: "Traditores autem, qui dominum dominavum interfecerint, vel qui cum uxoribus dominorum suorum, vel filiabus, vel nutricibus dominorum concubuerint," &c. *Fleta*, Lib. I. cap. 37. § 4. "Ou disparage ma fiele, en ma chambre, ou ma femme, ou la norrice, de mon heire, ou le aint, &c." *Mirroir de Justice*, p. 31. Vide *Britton*, cap. 22. (70)

(e) In *Ryley's Placita Parliamentaria*, p. 266.
(f) Per *Nicholaum de Warzewick*, qui sequitur pro domino rege.

“gium & fidelitatem in eadem guerrâ in exercitu & auxilio ipsius com-
 “morans esset; idem Nicholaus de Segrave motu proprio, malitiosè,
 “& absque causâ contentionem & discordiam versus Johannem de
 “Crumbwell in eodem exercitu similiter in auxilium regis existentem
 “movebat,” laying great iniquities to his charge; that Crumbwell
 offered to defend himself against these imputations, as the king’s court
 should award: *Et ad hoc fidem suam ei dedit; et post ejusdem fidei*
dationem prædictus Nicholaus elongando se & suos, & extrahendo præ-
dictum Johannem & suos ab exercitu & auxilio ipsius domini regis,
quantum in ipso Nicholao fuit, eundem dominum regem inter inimicos
suos periculo hostium suorum relinquendo sprexit, & prædictum Johan-
nem ad se defendendum incuria regis Franciæ adjornavit, & certum diem
ei dedit; et sic, quantum in eo fuit, submittens & subjiciens dominium
regis & regni Angliæ subjectioni domini regis Franciæ; and that in pur-
 suance thereof contrary to the king’s prohibition he took his

[80]

journey towards France; and that he did this “nequiter & ma-
 “litiosè in personæ domini regis periculum, curiæ suæ contemptum, coronæ
 “& dignitatis suæ regiæ læsionem & exhæredationem manifestam, &
 “contra ligeantiam, homagium, juramentum, & fidelitatem, quibus ipse
 “domino regi tenebatur.” Segrave confessed the offense. The lords
 in parliament are charged by the king upon their allegiance to give
 advice, what punishment was to be inflicted; “Qui omnes habito super
 “hoc diligenti tractatu & advisamento, consideratis & intellectis omni-
 “bus in dicto facto contentis & per prædictum Nicholaum plenè & ex-
 “pressè cognitis, dicunt, quod crimen hujusmodi meretur pœnam amif-
 “sionis vitæ, &c.” but he was after pardoned.

Which judgment seems to import no less, than the crime of high
 treason, tho the whole judgement be not declared at large but with
 an &c.

Accroaching of royal power was a usual charge of high treason
 antiently, tho a very uncertain charge, that no man could well tell
 what it was, nor what defense to make to it.

The great charge against the *Spencers* about the 1 E. 2. was, that
 they did accroach royal power, whereof several instances are given (g).

The great charge against *Roger Mortimer* in the parliament of 4
 E. 3. next to that of the procurement of king *Edward II*’s death,
 was accroaching of royal power, whereof several instances are given;

but he had judgment by the lords in parliament to be drawn and hanged, upon that article only, that concerned the death of king Edward II. *Vide infra cap. 14.*

Trin. 21 E. 3. Rot. 23. rex coram rege. John Gerberge, Knt. indicted "*Quod ipse simul cum aliis in campo villæ de Royston in altâ regiâ stratâ,*" rode armed with his sword drawn in his hand *modo guerrino*, and assaulted and took William de Botelisford, and detained him, till he paid 90*l.* &c. and took away his horse, "*usurpando sibi*" "*infra regnum regis regiam potestatem ipso domino rege in partibus*" "*exteris existente, contra sui ligeantiam, & regis & coronæ suæ præjudicium, & seditionem manifestam:*" he prayed his clergy, but was ousted of it, *Quia privilegium clericale in hujusmodi* [81] *casu seditionis secundum legem & consuetudinem regni hætenus obtentas & usitatas non est allocandum (h):* but yet he refusing to plead was not convicted, as in case of treason, but was put to penance, *ad penitentiam suam*; two of his companions being convicted by verdict, had judgment, *quod distrabantur & suspendantur.*

This judgment it seems troubled the commons in parliament, who thought, that the accroaching of royal power was somewhat too general a charge of treason before the ordinary courts of justice, tho it had been used in charges of treason in parliament; and therefore in the parliament following held *Craftino Hilarii 21 E. 3. n. 15.* there is a petition in parliament in these words: *Item prie le comen, qe come ascuns des justices en place devant eux ore de novel ont adjudges pur treason accroachment de royal poer, pry le dit comen, que le point soit desclare en ceo parlement, en quele case ils accrochent royal poer, per quei les seigneurs perdent leur profit de le forfeiture de leur tenents, et les arreynes beneficie de seint esglise.*

Ro'. En les case, ou tiel judgments sont rendus, sont les points des tieux treasons et accrochments declares per mesmes les judgments.

In 22 *Aff. 49. (i)*, it appears, that John at Hill was indicted, and attaint of high treason for the death of Adam de Walton *nuntii domini regis missi in mandatum ejus exequendum.*

And in the year before, *viz. 21 E. 3. 23.* it seems admitted, that an appeal of treason lies for the killing one of malice prepenſe, that was sent in aid of the king in his wars with certain men of arms.

(b) For the same reason clergy was refused in Thorpe's case, *T. 21 E. 3. Rot. 23.* *Rex. de quo vide postea.*

(i) *E. Treason 14.*

King *Edward II.* being deposed, and committed prisoner to *Barclay* castle under the custody of *John Matravers* and *Thomas Gurney*, was there by the procurement of *Roger Mortimer* barbarously murdered; for which *Mortimer* and *Gurney* were attainted of treason by judgment of the lords in parliament. 4 E. 3. n. 1, 5. (*k*).

[82] *Matravers* was suspected to be guilty, but yet he played another game, for tho he knew of the death of *Edward II.* yet he informed *Edmund* earl of *Kent*, half-brother to *Edward II.* that he was living; the earl therefore with many others raised a force for his deliverance, but prevailed not, but was for that fact attainted of treason, anno 3 E. 3. which attainder was afterwards in the parliament 28 E. 3. reversed, and the grand child of the earl of *Kent* restored (1): *John Matravers*, who it seems had animated the insurrection of the earl of *Kent*, tho he fled into *Germany*, yet by judgment of the lords in parliament 4 E. 3. n. 3. was attainted of treason for the death of the earl of *Kent*: the words of the records are, “*Tres-touts les peres, counts, et barons assemblez a cest parlement a Westminster si ont examine estraitment, et sur ce sont assentus et accordes, qe John Matravers si est culpable de la mort Esmon count de Kent le uncle nostre seigneur le roy qe ore est, come celui qe principalement, trayterousment et fausement la mort le dit counte compassa issint, qe la ou le dit John savoit la mort le roy Edward, ne pur quant le dit John par enginuous manner et par ses fausses et mauveyse subtilities fist le dit counte intendre la pye le roy, le quel fausse compassement fust cause de la mort le dit counte et de tout le mal qe s’ ensuist, par quoi les sus-dits peres de la tre et jugges du parlement ajuggent et agardent, que le dit John soit treine, pendus, et decolle, come treitre, queu part, qil soit estre troue.*”

Upon this judgment *Matravers* brought a petition of reversal. *Rot. Parl.* 21 E. 3. n. 65. *dors.* but nothing was done upon it; but *Rot. Parl.* 25 E. 3. p. 2. n. 54, 55. he was restored by act of parliament.

By these, and the like instances, that might be given, it appears, how uncertain and arbitrary the crime of treason was before the statute of 25 E. 3. whereby it came to pass, that almost every offense,

(*k*) *Vide Rot. Parl.* 28 E. 3. n. 8. when the judgment against *Mortimer* was reversed.

(1) That attainder was reversed long before, viz. 4 E. 3. *Vide Rot. Parl.* 4 E.

3. n. 11, 12. upon the petition of *Edmund* his eldest son, and *Margaret* countess dowager of *Kent*; and *Edmund* the son was restored.

that was, or seem'd to be a breach of the faith and alligance due to the king, was by construction and consequence and interpretation raised into the offense of high treason.

And we need no greater instance of this multiplication of constructive treasons, than the troublesome reign of king [83] Richard II. which, tho it were after the limitation of treasons by the statute of 25 E. 3. yet things were so carried by factions and parties in this king's reign, that this statute was little observed; but as this, or the other party prevailed, so the crimes of high treason were in a manner arbitrarily imposed and adjudged to the disadvantage of that party, that was intended to be suppressed; so that *de facto* that king's reign gives us as various instances of these arbitrary determinations of treasons, and the great inconveniences that arose thereby, as if indeed the statute of 25 E. 3. had not been made or in force. And tho most of those judgments and declarations were made in parliament (*); sometimes by the king, lords, and commons; sometimes by the lords, and afterwards affirmed and enacted, as laws; sometimes by plenipotentiary power committed by acts of parliament to particular lords and others, yet the inconvenience, that grew thereby, and the great uncertainty, that happened from the same, was exceedingly pernicious to the king and his kingdom.

I shall give but some instances. *Rot. Parl. 3. R. 2. n. 18. John Imperial*, a public minister, came into the kingdom by the safe-conduct of the king, and he was here murdered (m); and an indictment taken by the coroner upon the view of his body, "*Quel case examine et dispute entre les seigneurs et commons, et puis monstre au roy en plein parlement, estoit illoques devant nostre dit seigneur le roy declare, determine, et assensus, qe tiel fait et coupe est treason, et crime de royal majesty blemys, en quel case y ne doet allouer a nulli de enjoyer privilege de clergy (n).*"

This declaration, it is true, was made and grafted upon the clause in the latter end of the statute of 25 E. 3. touching declaring of treasons by parliament.

In the parliament of 10 R. 2. there was a large commission (o) granted by the king upon the importunity of certain great lords, and of the commons in parliament, to the archbishop [84]

(*) This was the reason why the statute of 25 E. 3. was not followed, because that statute was not thought to limit declarations in parliament.

(m) *Holin. Chron. p. 422. 60. b.*

(n) See 3 Co. *Instit.* 8.

(o) See this commission 10 R. 2. cap. 1. and *State Trials, Vol. 1. p. 3.*

of *Canterbury* and others for the reformation of many things supposed to be amiss in the government; which commission was thought to be prejudicial to the king's prerogative. *Vide Rot. Parl. 10 R. 2. n. 34. Rot. Parl. 21 R. 2. n. 11.*

After this, *viz. 25 Aug. 11 R. 2.* the king called together the two chief justices, and divers others of the judges, and propounded divers questions touching the proceeding in that parliament, and the obtaining of that commission; and they gave many liberal answers, and among the rest, "*Qualem pœnam merentur, qui compulerunt sive actârunt regem ad consentiendum confessioni dictorum statuti, ordinationis, & commissionis? Ad quam quæstionem unanimiter responderunt, quod sunt, ut proditores, merito puniendi: Item qualiter sunt illi puniendi, qui impediverunt regem, quo minus poterat exercere, quæ ad regalia & prærogativam suam pertinuerunt? Unanimiter etiam responderunt, quod sunt ut proditores, etiam puniendi,*" with divers other questions, and answers to the like purpose (*p*).

This extravagant, as well as extrajudicial declaration of treason by these judges, gave presently an universal offense to the kingdom; for presently it bred a great insecurity to all persons, and the next parliament *crastino purificationis 11 R. 2.* there were divers appeals of treasons by certain lords appellors, wherein many were convicted of high treason under general wërds of *accroaching royal power, subverting the realm, &c.* and among the rest those very judges, that had thus liberally and arbitrarily expounded treason in answer to the king's questions, were for that very cause adjudged guilty of high treason, and had judgment to be hanged, drawn, and quartered, tho the execution was spared (*q*); and they having led the way by an arbitrary construction of treason not within the statute, they fell under the same fate by the like arbitrary construction of the crime of treason.

Neither did it rest here, for the tide turned, and in *Rot. Parl. 21 R. 2. n. 12, 13.* the commission before-mentioned, and the whole parliament of *11 R. 2.* is repealed, and a new appeal of treason against the duke of *Gloucester*, earl of *Arundel*, and the commissioners in the former commission, and the procurers thereof under that common style of *accroaching royal power*, whereupon divers of them were condemned as traitors: and *n. 18.* there were

(*p*) See the questions and answers, *State Trials, Vol. I. p. 8.*

(*q*) They were all banished to Ireland

except *Tresilian*, who was executed according to the judgment. See *State Trials, Vol. I. p. 13, 14.*

four points of treason farther declared, viz. "*Chescun qe compasse, et
 "purpose la mort le roy, ou de lui deposer, ou de susprendre son homage
 "liege, ou celui, qe levy le people, et chivache encontre le roy a faire
 "guerre deins son realme, et de ceo soit dument atteint, et adjugge en
 "parlement, soit adjuggez come traytor de haut treason encontre la
 "corone, et forfeit de lui, et de ses heyres, quecunques tous ses terres,
 "tenemens, et possessions, et libertys, et tous autres inheritements, queux
 "il ad, ou ascun autre a son oeps, ou avoit le jour de treason perpetres,
 "si bien en fee tavel, come de fee simple, au roy.*"

These four points of treason seem to be included within the statute of 25 E. 3. as to the matter of them, as shall be hereafter shewed; but with these differences, viz. 1. The forfeiture is extended farther than it was formerly, namely to the forfeiture of estates-tail and uses. 2. Whereas the antient way of proceeding against commoners was by indictment, and trial thereupon by the country, the trial and judgment is here appointed to be in parliament. 3. But that, wherein the principal inconvenience of this act lay, was this, that whereas the statute of 25 E. 3. required an overt-act to be laid in the indictment, and proved in evidence, this act hath no such provision, which left a great latitude, and uncertainty in point of treason, and without any open evidence, that could fall under human cognizance, subjected men to the great punishment of treason for their very thoughts, which without an overt-act to manifest them are not triable but by God alone.

These were the unhappy effects of the breaking of this great boundary of treason, and letting in of constructive treasons, which by various vicissitudes and revolutions mischieved all parties first or last, and left a great unquietness, and unsettledness in the minds of people, and was one of the occasions of the unhappiness of that king. [86]

Henry IV. usurping the crown, and the people being sufficiently sensible of the great mischiefs they were brought in by these constructive treasons, and the great insecurity thereby, *Rot. Parl. 1 H. 4. n. 70.* the parliament of 21 R. 2. is entirely repealed, that of 11 R. 2. entirely revived; and it was enacted (r), that a parliamentary authority be not for the future lodged in a committee of particular persons, as it was done 21 R. 2. *Et auxint mesme nostre
 "seigneur le roy de son propre mortif reherceant, qe come in le dit par-*

(r) See 1 H. 4. cap. 3, 4 & 5.

“ lément tenuz l’an 21. y fueront ordeynes per estatute plusieurs pains
 “ de treason, si qe y ne avoit ascun home, qe savoit, come il se deust
 “ savoir, de faire, parler, ou dire pur doubt des tielx paines, dist, qe
 “ sa volunte est tout outrement, qe en nul temps avener ascun trayson
 “ soit adjugges autrement qil ne feust ordeigne par statute en temps de
 “ son noble aiel le roy E. le 3. qe dieu assoyl; dont les dits seigneurs et
 “ comens fuerent tres grandment rejoyces, et mult humblement ent re-
 “ mercierent nostre dit seigneur le roy (f).”

Now altho the crime of high treason is the greatest crime against faith, duty, and human society, and brings with it the greatest and most fatal dangers to the government, peace, and happiness of a kingdom, or state, and therefore is deservedly branded with the highest ignominy, and subjected to the greatest penalties, that the law can inflict; yet by these instances, and more of this kind, that might be given, it appears, 1. How necessary it was, that there should be some fixed and settled boundary for this great crime of treason, and of what great importance the statute of 25 E. 3. was, in order to that end. 2. How dangerous it is to depart from the letter of that statute, and to multiply and inbanse crimes into treason by ambiguous and general words, as *accreaching of royal power, subverting of fundamentall laws*, and the like; and 3. How dangerous it is by construction and analogy to make treasons, where the letter of

[87] the law has not done it: for such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men (t).

See 4. Bla. Com, c. vi. and Fost. Discourse on High Treason, page 183 to 251.

C H A P. XII.

Touching the statute of 25 E. 3. and the high treasons therein declared.

A Parliament was held on *Wednesday* on the feast of St. Hill. 25 E. 3. at which parliament the statute declaring the points of treason was made. The petition of the commons, upon which it

(f) See 1 H. 4. cap. 10.

(t) This reasoning of our author is equal-

ly strong against constructive interpretations of compassing the death of the king.

was made, is *Ret. Parl.* 25 E. 3. p. 2. n. 17. in these words: “ Item
 “ come les justices nostre seigneur le roy assignes en diverses countees
 “ ajuggent les gents, qe sont empeches devant eux, come treitors par
 “ divers causes disconus a la comen estre treison, qe plesse a nostre
 “ seigneur le roy par son counsel, & par les graunts & sages de la
 “ terre declarer les points de treison en cest present parlement.

“ *Ro.* Quant a la petition touchant treison nostre seigneur le
 “ roy ad fait declarer les articles de ycele en maner qe ensuit: cest
 “ assavoir, en case quant home face compafer ou ymager la mort
 “ nostre seigneur le roy, ou madame sa compaignie, ou de lour fitz
 “ primer & heir; ou si home violast la compaignie le roi, & la eisme
 “ fille le roy nient marié, & la compaignie a leisme fitz & heire du
 “ roi; & si home leve de guerre contre nostre seigneur le roy en
 “ son royaume; ou soit adhereant as enemies nostre seigneur le roy
 “ en le royaume, donant a eux aide, & confort en son royaume ou par
 “ ailleurs, & de ceo provablement soit atteint de overt fait par gents
 “ de lour condicion: Et si home contreface le grant seale [88]
 “ le roy, ou sa monnoie, & si home apporte fausse monnoie
 “ en cest royaume contrefait a la monnoie dengleterre, si come la mo-
 “ noie appelee *Lusseburgh*, ou autre semblable a la dite monnoie
 “ dengleterre, sachant la monnoie estre fausse, pur marchander ou
 “ paiement faire en deceit nostre seigneur le roy & de son peuple:
 “ Et si home tuast chancellor, treasurer, ou justice nostre seigneur le
 “ roi del un baunk, ou del autre, justice en eir, des assizez & de touz
 “ autres justices assignez a oyer & terminer, esteantz en lour places
 “ enfeisant lour office. Et fait a entendre qe en les cases susnommes
 “ doit estre ajuggee treisonce, qe estent a nostre seigneur le roi & a
 “ sa royale majeste, & de tiels maneres de treison la forfeiture des
 “ escheets appartient a nostre seigneur le roy, sibien des terres, &
 “ tenementz tenuz des autres, come de lui mesme: ouesque ceo il y
 “ ad autre manere de treison, cest assavoir, quant un servent tue son
 “ mestre, une feme, qe tue son baron, quant home secular ou de
 “ religion tue son prelate, a qi il doit foi & obedience, & tiel manere
 “ de treison doun forfeiture des escheets a chescun seigneur de son
 “ fee propre; & pur ceo qe plusours autres cas de semblable treison
 “ purront eschaier en temps avenir, queux home ne purra penser ne
 “ declarer en present, assentu est qe qui autre cas suppose treison,
 “ qe nest especifiez peramont, aviegne de novel devant aucuns jus-
 “ tices, demoerge la justice sanz aler a jugement de treison, tant-
 que

“ que per devant nostre seigneur le roy & son parlement soit le case
 “ monstre, & declare, le quel ceo doit estre ajugge trefon, ou aut'
 “ felonie; & si par cas ascun home de cest royaume chivache armee
 “ descouvert, ou secretment ad gentz armez contre ascun autre pur
 “ lui tuer ou desfrober, ou pour lui prendre & retener tanque il face
 “ fyn ou raunceon pur sa delivrance avoir, nest pas lentent du roy
 “ & du son counseil, qe en tiel cas soit ajugge trefon, einz soit ajugge
 “ felonie, ou trespas solonc la ley de la terre auncienement usee, &
 “ solonc ceo que le cas demand: Et si en tiel cas, ou autre sem-
 [89] “ blable devant ces heures ascun justice eit ajugge trefon, &
 “ par ycelle cause les terres & tenementz devenuz en la maine
 “ nostre seigneur le roi come forfaitz eient les cheifes seignours de fee
 “ lour escheers des tenementz de eux tenuz, le quel qe les tenementz
 “ soient en la maine le roi ou en main dauters par doun, ou en autre
 “ manere: savant toutes foits a nostre seigneur le roi lan, & le wast,
 “ & auters foiseitures des chatelx, qe a lui attient en les cas susno-
 “ mez, & qe briefs de *scire facias* vers les terre-tenants soient grantez
 “ en tiel cas sanz autre original & sanz alouer la protection nostre
 “ seigneur le roi en la dite fuyte; & de les terres, qe sont in la maine
 “ le roi, soient grantes briefs as viscontz des countees la, ou les terres
 “ ferront, de ouster la maine sanz autre delaie.”

The statute itself is drawn up upon this petition and answer, and differs nothing in substance from the answer to the petition upon the parliament-roll: the statute itself runs in these words: “ *Item,*
 “ whereas divers opinions have been before this time in what case
 “ treason shall be said, and in what not, the king at the request of
 “ the lords and of the commons hath made a declaration in the
 “ manner, as hereafter followeth; that is to say, when a man doth
 “ compass or imagine the death of our lord the king, or our lady his
 “ queen, or of their eldest son and heir; or if a man do violate the
 “ king’s companion, or the king’s eldest daughter unmarried, or the
 “ wife of the king’s eldest son and heir; or if a man do levy war
 “ against our lord the king in his real, or be adherent to the king’s
 “ enemies in his realm, giving to them aid and comfort in the realm
 “ or elsewhere, and thereof be provably (a) attainted of open deed
 “ by the people of their condition; and if a man counterfeit the
 “ king’s great or privy seal, or his money; and if a man bring false

(a) See 3 Co. Inst. p. 121.

“ money into this realm counterfeit to the money of *England*, as
 “ the money called *Lusburgh*, or other like to the said money of
 “ *England*, knowing the money to be false, to merchandize or make
 “ payment in deceit of our lord the king and of his people: and if a
 “ man slay the chancellor, treasurer, or the king’s justices of the one
 “ bench or the other, justices in eyre, or justices of assize, and all
 “ other justices assigned to hear and determine, being in [90]
 “ their places doing their offices. And it is to be under-
 “ stood, that in the cases above rehearsed that ought to be judged
 “ treason, which extends to our lord the king and his royal majesty,
 “ and of such treason the forfeiture of the escheats pertaineth to our
 “ lord the king, as well of the lands and tenements holden of others,
 “ as of himself: and moreover there is another manner of treason,
 “ that is to say, when a servant slayeth his master, or a wife her
 “ husband, or when a man secular, or religious, slayeth his prelate,
 “ to whom he oweth faith and obedience; and of such treason the
 “ escheats ought to pertain to every lord of his own fee: and be-
 “ cause that many other like cases of treason may happen in time
 “ to come, which a man cannot think nor declare at this present time,
 “ it is accorded, that if any other case supposed treason, which is
 “ not above specified, doth happen before any justices, the justices
 “ shall tarry without any going to judgment of the treason, till the
 “ cause be shewed and declared before the king and his parliament,
 “ whether it ought to be judged treason, or other (*b*) felony: and
 “ if *par case* any man of this realm ride armed covertly, or secretly
 “ with men of arms against any other to slay him, or rob him, or
 “ take him, or retain him, till he hath made fine or ransom for to
 “ have his deliverance, it is not the mind of the king, nor his
 “ council, that in such case it shall be judged treason, but shall be
 “ judged felony, or trespass according to the laws of the land of old
 “ time used, and according as the case requireth. And if in such
 “ case, or other like, before this time any justices have judged trea-
 “ son, and for this cause the lands and tenements have come into
 “ the king’s hands as forfeit, the chief lords of the fee shall have
 “ the escheats of the tenements holden of them, whether that the
 “ same tenements be in the king’s hands, or in others by gift, or in
 “ other manner; saving always to our lord the king the year and

(*b*) The old translation seems here to be preferable, *viz.* *esse*; for *aut* being abbreviated may be either *autre* or *autrement*,

“ the waft, and the forfeitures of chattels, which pertain to him in
 “ the cafes above-named; and that writs of *ſcire facias* be granted
 “ in ſuch caſe againſt the land-tenants without other original, and
 “ without allowing any protection in the ſaid ſuit; and that of the
 “ lands, which be in the king’s hands, writs be granted to the ſheriffs
 “ of the counties, where the lands be, to deliver them out of the
 “ king’s hands without delay.”

The ſeveral high treaſons hereby declared are theſe:

1. The compaſſing of the death of the king, queen, or prince, and declaring the ſame by an overt-aſt.
2. The violation or carnal knowledge of the king’s confort, the king’s eldeſt daughter unmarried, or the prince’s wife.
3. The levying of war againſt the king.
4. The adhering to the king’s enemies within the land or without, and declaring the ſame by ſome overt-aſt.
5. The counterfeiting of the great ſeal or privy ſeal.
6. The counterfeiting of the king’s coin, or bringing counterfeit coin into this realm.
7. The killing of the chancellor, treaſurer, juſtices of the one bench or the other, juſtices in eyre, juſtices of aſſiſe, juſtices of *oyer* and *terminer* in their places doing their offices.

1. Hawk, P. C. 34, &c.

C H A P XIII.

Touching high treaſon in compaſſing the death of the king, queen, or prince.

THE firſt article of high treaſon declared by the ſtatute of 25 *E.* 3. is this, and in theſe words:

“ *When a man doth compaſs or imagine the death of our lord the king, or of our lady the queen, or of their eldeſt ſon and heir.*”

[92] Upon this diviſion there will be theſe conſiderations.

- I. What ſhall be ſaid *a man that compaſſeth.*
- II. What ſhall be ſaid the *king, queen, or their eldeſt ſon.*
- III. What ſhall be ſaid *a compaſſing or imagining of any of their deaths.*

VI. What

IV. What shall be evidence, or an *overt-act* to prove such imagining.

V. The form of an indictment of compassing the death of the king, queen, or prince.

I. What shall be said *a man compassing*, &c.

The general learning of this point in relation to natural, accidental, or civil incapacities hath been at large handled in the former chapters; but there is something peculiar to the case of high treason, which is considerable in this division.

If an *alien army* comes into *England*, and here compasses the death of the king, queen, or prince, this is a man compassing within this law; for, tho he be the natural subject of another prince, yet during his residence here he owes a local allegiance to the king of *England*, and tho the indictment shall not style him *naturalis subditus*, nor style the king *naturalem dominum*, yet it shall run *proditorie & contra ligantia suæ debitum*. *Co. P. C. p. 5. 7 Rep. Calvin's case (a). Dyer 144.*

If an *alien amy* subject of another prince comes into this kingdom and here settles his abode, and afterwards war is proclaimed between the two kings, and yet the alien continues here and takes the benefit of the king's laws and protection, and yet compasses the death of the king, this is a man compassing within this law; for, tho he be the natural subject of another prince, he shall be dealt with as an *English* subject in this case, unless he first openly remove himself from the king's protection by passing to the other prince, or by a public renunciation of the king of *England's* protection, which hath some analogy with that, which they call *diffidatio*, or defiance.

And the same law I take to be, if the subject of a foreign prince in war with ours come into *England* and here trade and inhabit either as a merchant, dweller, or sojourner, if such a person compasses the death of the king, he may be dealt with as a traitor, because he comes not hither as an enemy, or by way of hostility, but partakes of the king's protection: with this agrees the case of *Stephano Farrara de Gama*, and *Emanuel Lewes Tinoco*, *Portuguese* born, and then subjects to the king of *Spain*, between whom and the queen of *England* there was then open war, who were indicted and attaind of high treason for conspiring with *Dr. Lopez* to poison the queen (*b*). *37 Eliz: Calvin's case. 7 Co. Rep. p. 6.*

(a) fol. 6, 17.

(b) Vide *Camdeni Eliza*, sub anno 1594.

And, tho they came hither with the queen's protection, it alters not the case, for every foreigner living publicly and trading here is under the king's protection: and this appears by the statute of *Magna Charta*, cap. 30. "*Et si de sint terrâ contra nos guerrinâ, & tales inveniantur in terrâ nostra in principio guerræ, attachientur sine damno corporum suorum vel rerum, donec sciatur a nobis vel a capitali iusticiario nostro, quomodo mercatores terræ nostræ tractentur, qui tunc inveniantur in terrâ illâ contra nos guerrâ; & si nostri salvi sint ibi, alii salvi sint in terrâ nostrâ.*"

The statute speaks indeed of *mercatores*, but under that name all foreigners living or trading here are comprised.

And therefore in ancient times before the subjects of foreign princes in hostility residing here were dealt with as enemies, a proclamation issued for their avoidance out of the kingdom; and in default of their avoidance within the time limited by such proclamation they lost the benefit of the king's protection.

And after such proclamation, yet upon caution given sometimes by mainprise *de se bene gerendo*, sometimes by oaths of fidelity to the king, they had sometimes special, and oftentimes general protections, notwithstanding such hostility. *Rot. Vascon.* 18 E. 2. 21, 24. *Pat.* 14 H. 6. part. 2. m. 34, 35.

The statute of the *Staple* (c), cap. 17. hath made provision for merchant strangers, in case war shall happen between their prince and the king of *England*, viz. that they shall have convenient warning by [94] forty days by proclamation to avoid the realm; and if they cannot do it by that time by reason of some accident, they shall have forty days more, and in the mean time liberty to sell their merchandizes: during these eighty days they have the king's protection, and if they do any treasonable act above-mentioned, they shall be indicted of treason, notwithstanding the hostility between their sovereign and the king of *England*; but it seems, that if he remain here in a way of trade after proclamation so made, and the time of his demurrage allowed by this act, he may be dealt with as an alien enemy; but yet if he after that time continues in his way of trade or living as before, and shall then conspire the king's death, &c. the king may deal with him as an alien enemy by the law of nations, or as a traitor by the law of the land; because *de facto* he continues as a subject, and under the benefit *de facto* of the king's protection.

Therefore the general words in *Co. P. C.* page 5. wherein he supposeth an alien enemy cannot be guilty of treason, but must be dealt with by martial law, are to be taken with that allay, that is given in *Calvin's case*, fol. 6. b. in these words; "But if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason, for the indictment cannot conclude contra ligeantiae suae debitum:" the like may be said of such as are sent over merely as spies by a foreign prince in hostility; but an alien enemy living here in the condition of an inhabitant or trader may be guilty of treason as well as an alien amy, for he doth it *proditorie* and treacherously, and against the obligation that lies upon him, as well as any others, to be true to the prince, the benefit of whose laws and protection he holds, so long as he is under the same.

But yet this is observable upon the statute of *Magna Charta*, cap. 30. and what hath been before said, 1. That if an alien enemy comes into *England* after the war begun, and lives here under the king's protection as a subject, yet if he practise treason against the king during such his abode here, he may be indicted of high treason *contra ligeantiae suae debitum*. 2. Yet such an alien, coming in after the war begun without the king's licence or safe-conduct, cannot claim the privilege allowed by the statute of *Magna Charta*, cap. [95]

30. to those that were here before the beginning of the war. 2 *Co. Inst.* 58. 3. That by the law of *England* debts and goods found in this realm belonging to alien enemies belong to the king, and may be seized by him. 19 *E.* 4. 6. 7 *E.* 4. 13. and therefore in debt brought by an alien enemy it is a good plea in bar *prima facie*, that the person is an alien born in *G. in partibus transmarinis sub obedientia Philippi regis Hispaniæ hostis & inimici domini regis*; so that, tho to some purposes he is under the king's protection, so as to be guilty of treason, if he conspire against the king's life, yet his goods are not by law privileged from confiscation; and the reason is, because he might secure his goods by purchase of letters patents of denization, and he shall not take away the king's rights by his neglect therein.

But then, what if in truth our merchants have liberty of reclaiming their goods and recovering their debts in the hostile country? May the merchant plaintiff reply with this clause of the statute of *Magna Charta*, that "*Nostri mercatores salvii sunt ibi, &c.*"

I answer, he cannot, for it is reserved to another kind of trial; for the words are "*donec sciatur a nobis vel a capitali iudiciario nostro,*"

“*quomodo mercatores nostri ibi tractentur.*” The king must be ascertained of the truth of the fact, in whose cognizance it best lies; and if he be satisfied, that our merchants are permitted to recover their debts in the hostile kingdom without impediment or confiscation, this is to be notified and declared by some proclamation, or instrument under the great seal declaring the fact, and allowing them to prosecute for their debts here; and then, by virtue of this statute or public declaration, the merchant alien plaintiff may reply with this special matter in maintenance of his action.

Here somewhat may be of use to be said touching treasons by embassadors of foreign princes, wherein altho sometimes reason of state and the common interest of princes do *de facto* govern in these cases, yet it will not be amiss to consider the opinions and practices of former times in relation to this matter.

[96] *First*, If an *Englishman* born, tho he never took the oath of allegiance, becomes a sworn subject to a foreign prince, and is employed by him into *England* as his minister, agent, or ambassador, and here conspires against the king's life, he shall be indicted and tried for treason, as another subject should be; and the reason is, because no man can shake off his country wherein he was born, nor abjure his native soil or prince at his pleasure. This was the case of *Dr. Story*, who had sworn allegiance to the crown of *Spain*, and was here condemned and executed for treason. *Vide Camden's Eliz. 14 p. Eliz. 168 (d).*

Secondly, But if a foreigner being the agent, minister, or ambassador of a foreign prince either in amity or enmity with the king of *England* come over with or without the king's safe-conduct, and here conspire against the life of the king, or to raise rebellion or war against him, some have been of opinion, that he may be indicted of treason; but by the civilians he cannot, because he came in as a foreign ambassador representing the person of his prince, and therefore is not to be so dealt with in such case, but by the law of nations may be dealt with as an enemy, not as a traitor; and tho he have the protection and safe-conduct of the king of *England*, yet it is under a special capacity, and for a special end, namely, as a foreign agent; but if he be criminally proceeded against, it must be as an enemy by the law of war or nations, and not as a traitor; but how far and in what

cases he may be dealt with as an enemy, remains to be farther considered. *Camden's Eliz. sub anno 1571. p. 164.*

Thirdly, therefore those, that are most strict after the rights and privileges of ambassadors, yet seem to agree, that if he do not only conspire the death of the king or the raising a rebellion against him, but actually attempt such an act, as actually or interpretatively is a consummation thereof, tho possibly the full effect thereof do not ensue, yet he may be dealt withal as an enemy, and [97] by the law of nations he may be put to death, as if he should stab or poison the prince, and yet doth not kill him, or raise an actual rebellious army, or should levy an actual war against the prince to whom he was sent, and in that prince's country, as *Fabius (e)* the Roman ambassador to the *Gauls*, by challenging and fighting with the champion of the *Gauls*; *Plutarch in vitâ Numæ*, the prince, to whom he is sent, may, without consulting the prince that sends him, inflict death upon such an ambassador by the law of nations, as an enemy: "*Consummata autem sunt, que eousque producta sunt, quo produci ab hominibus solent, & quæ delinquendi finem statuere solemus.*" "*Vide Albericus Gentilis, Lib. II. cap. 2. de legationibus.*"

Fourthly, But in case of a bare conspiracy against the life of the king, or a conspiracy of a rebellion or change of government, *novarum rerum molimina*, there is great diversity of opinions among learned men, how far the privilege of an ambassador exempts him from penal prosecution as an enemy for such conspiracies or inconsummate attempts, that do not proceed farther than the machination, solicitation, or conspiracy.

Upon an attempt of this nature by the bishop of *Rosse*, agent and ambassador of the queen of *Scots*, 14 *Eliz.* the question was propounded to *Lewes, Dale, Drury, Aubry, and Jones*, doctors of law, viz.

"Whether an ambassador, who stirreth up rebellion against the prince to whom he is sent, should enjoy the privileges of an ambassador, and not be liable to the punishments of an enemy?"

They answered, that such an ambassador hath by the law of nations, and by the civil law of the *Romans*, forfeited all the privileges of an ambassador, and is liable to punishment. See the rest of the resolutions touching this matter *Camden's Eliz. sub anno 1571. p. 164, 165. & ibidem p. 370.*

Hereupon he was committed to the Tower, but yet no criminal process against him as an enemy.

[98] And *Mendoza* the *Spanish* ambassador, who here in *England* fostered and encouraged treason, was not dealt with according to the utmost severity, that possibly in such cases might be used, but was only sent away, *sub anno 27 Eliz. Camden's Eliz. p. 296.* The lord *L'Aubespine* also, the *French* ambassador, that conspired the queen's death, was not proceeded against criminally, but only reproved by *Burghley*, and advised to be more careful for the future. *Camden's Eliz. sub anno 1587. p. 378, 379.*

And upon these and some antient instances among the *Romans* and *Carthaginians* learned men have been of opinion, that an ambassador is not to be punished as an enemy for traitorous conspiracy against the prince, to whom he is sent, but is only to be remitted to the prince that sent him. *Albericus Gentilis de Legationibus, Lib. II. cap. 18. Grotius de Jure Belli, Lib. II. cap. 18. (f)* who gives these two instances in confirmation thereof.

The truth is, the business of ambassadors is rather managed according to rules of prudence, and mutual concerns and temperaments among princes, where possibly a severe construction of an ambassador's actions, and prosecutions of them by one prince may at another time return to the like disadvantage of his own agents and ambassadors; and therefore they are rather temperaments measured by politic prudence and indulgence, than according to the strict rules of reason and justice; for surely conspiracies of this kind by ambassadors are contrary to the trust of their employments, and may be destructive to the state whereunto they are sent, and according to true measures of justice deserve to be punished, as acts of enmity, hostility, and treachery by private persons.

And altho of all hands it is admitted, that the prince, to whom the ambassador is sent, is the judge of the miscarriage of such foreign ambassador without any application to the master from whom he is sent, and without any actual dedition or giving him up to the judgment of the law; yet they assign this reason of the difference between a bare conspiracy or machination against the prince, and an actual attempt of treason, whether against his person or govern-

[99] ment, which hath attained as great a consummation as such ambassador is able to effect, as procuring the wounding of the prince,

or an actual attempt to poison him, tho death ensue not, or an actual raising of a rebellious army against him; because in these latter the mischief is consummate, as far as the ambassador could effect it, and so prohibited not only by the civil and municipal laws, but by the laws of nations; but inconsummate machinations, accord to their opinions, are raised to the *crimen læsæ majestatis* by civil or municipal laws or constitutions; and they think it too hard, that an ambassador or foreign agent, who doth *sustinere personam principis*, should be obnoxious to a capital punishment for bare machination or conspiracy, which is a secret thing and of great latitude; but this, as I have said, is rather a prudential and politic consideration, and not according to the strict measure of justice.

But now, altho it should be admitted that a foreign ambassador committing a consummate treason is not to be proceeded against as a traitor, but as an enemy; yet if he or his associates commit any other capital offense, as rape, murder, theft, they may be indicted and proceeded against by indictment in an ordinary course of justice, as other aliens committing like offenses; for tho those indictments run *contra pacem regis*, yet they run not *contra ligeantiæ suæ debitum*; and therefore, when in the late troubles the brother and servants of the Portugal ambassador committed a murder in the Exchange (g), they were tried and convicted by a special commission of *oyer and terminer* directed to two judges of the common law, some civilians, and some gentlemen, to proceed according to the ordinary course, *secundum legem & consuetudinem regni Angliæ*, whereupon some of them were convicted by jury, and had judgment; and, as I remember, some of them were executed (h). And yet many civilians (i) allow the same privilege to the *comites legati*, as to the ambassador himself. [100]

And the difference between proceeding against an alien (whether ambassador or other) in cases of felony and treason, is well illustrated by the book of 40 Aff. 25. where a Norman captain of a ship with the help of English mariners committed robbery and piracy upon the narrow seas; the English pirates were convicted and attaind of trea-

(g) The New Exchange in the Strand.

(h) Don Pantaleon Sa, the ambassador's brother, was condemned to die for it: he had like to have prevented his execution by making his escape out of Newgate; but he was retaken, and beheaded on Tower-

bill, July 10, 1654, the same day the ambassador signed the peace between England and Portugal.

(i) Dig. Lib. XLVIII. tit. 6. *ad leg. Jul. de vi publica*, l. 7. Grot. *de jur. Belli*, Lib. II. cap. 18. §. 8.

son (*k*), but the *Norman* captain was attaind of felony, but not of treason, because it could not be said *contra ligeantiæ suæ debitum*.

The queen consort the wife of the king, or the husband of the queen regent, compassing the death of the king her husband or the queen regent his wife, are persons compassing within this act. *Co. P. C.* p. 8.

II. As to the second inquiry, what shall be said a king, queen, or their eldest son, within this law.

1. The words *our lord the king*, &c. extend to his successor, as well as to him (*l*).

1. Because it is a declarative law.

2. Because usually acts of parliament speaking thus generally, and not confining it to the person of that king, when the law passed, include his successor; therefore the statute of 8 H. 6. cap. 11. 23 Hen. 8. for *Brewers*. 27 H. 8. cap. 24. that were limited to continue during the pleasure of our lord the king, (*m*), continued after that king's death: *Mich.* 38 & 39 Eliz. Cro. Eliz. 513. Lord *Darcie's* case. The statute of 11 H. 7. c. 1. of aiding our lord the king in his wars extends to the successor (*n*). *Hill.* 10 Jac. 12 Co. Rep. 109.

[101] *M.* 24 Eliz. *Moore* 176. *Coke Litt.* 9. b. (*o*). But the statute of 34 & 35 H. 8. cap. 26. giving power to our said lord the king to alter the laws of *Wales*, died with him (*p*); yet in *majorém cautelam* it was specially repealed by the statute of 21 Jac. cap. 10.

(*k*) For before the 25 E. 3. piracy was petit treason. *Co. P. C.* 113. and tho' this case be quoted in the 40. E. 3. yet it must be intended to have happened before the statute of 25 Ed. 3. because piracy, not being enumerated therein among the species of treason, has never been counted treason since that statute. *Co. P. C.* 8.

(*l*) *Vide Co. P. C.* p. 6.

(*m*) Of these statutes the first only is so limited; but the 23 H. 8. cap. 4. sect. 5; 14. and 27 Hen. 8. cap. 24. sect. 10. only name the king without the addition of *his heirs and successors*. 10 H. 7. 7. b. it is said by *Kettle* with relation to 9. H. 6. cap. 2. and not denied by the court, that where a statute limits to *continue so long as it shall please our lord the king*, it continues in force, if no proclamation be made to the contrary in the times of that king or of any of his successors.

(*n*) This statute comes not up to the point, because the words of it are not, *our lord the king*, but, *the king and sovereign lord of this land for the time being*. Our author seems to have intended the *Irish* statute of 10 H. 7. called *Peyning's* act, upon which act a doubt was conceived, whether it extended to the successors of H. 7. for

that the act speaks only of the king generally, and not of his successors: the chief justices, chief baron, attorney and solicitor general were of opinion, that the word *king* imported his politic capacity, which never dies; and therefore being spoke indefinitely, extended in law to all his successors, and was so expounded by an *Irish* act in the 3 & 4 Phil. & Mar. 12 Co. Rep. 109.

(*o*) The case in *Moore* relates to statutes during the pleasure of the King: the words are, "*Walmesley* moved a question, whether the demise of the king determines a statute limited to continue during the king's pleasure, and the whole court agreed that the demise of the king determines his will."

(*p*) The words of that statute, §. 119. are, "*That the king's most royal majesty shall and may, &c. as to his most excellent wisdom and discretion shall be thought convenient; and also to make laws, &c. at his majesty's pleasure*." It was resolved by the justices, *Hil.* 5. Jac. 12 Co. Rep. 48. that this was a temporary power, and confined to the person of king Henry VIII. *Vide Plowden* 176. b. &c. 458. a.

2. The heir of the king is a king within this act the next moment after the death of his ancestor, and commenceth his reign the same day the ancestor dies; and therefore the compassing his death before coronation, yea before proclamation of him, is a compassing of the king's death, for he is a king presently upon the ancestor's death; and the proclamation or coronation are but honourable ceremonies (q) for the farther notification thereof: resolved 1 Jac. in the case of *Watson and Clerk. Co. P. C. p. 7.*

3. The queen regent, as were queen *Mary* and queen *Elizabeth*, is a king within this act (r).

4. A king *de facto* but not *de jure* (s), such as were *H. 4. H. 5. H. 6. R. 3. H. 7.* being in the actual possession of the crown is a king

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(q) The coronation is something more than only an honourable ceremony, for it is a solemn engagement to govern according to law, which was always required by the ancient constitution of the kingdom. *Brompton* speaking of the coronation of *W. I.* says, the archbishop of *York* performed the office. *Ipsumque Gulielmum regem ad jura ecclesie Anglicane tuenda & conservanda, populumque suum recte regendum, & leges rectas statuendum sacramento solemniter adstrinxit; and Bract. Lib. III. cap. 9.* says, that the king of *England* debet in coronatione sua in nomine *Jesu Christi* præstare sacramenta hæc tria promittere populo sibi subdito, &c. See also *W. & M. cap. 6.*

(r) Vide *Co. P. C. p. 7.* This appears by the declarative law in favour of queen *Mary*, 1. Mar. cap. 1. *sess. 3.*

(s) This distinction, which with respect to the kingly office, was never known in our law before the statute of 1 E. 4. seems to have been purposely invented to serve the turn of the house of *York*; nor do I find any such distinction ever mentioned or supposed in any of our ancient law-books, save only in *Bagot's* case, 9 E. 4. 1. b. cited by our author, p. 61. for the doubt conceived by *Markham*, 4 E. 4. 43. a. concerning the authority of coroners chosen in the time of *H. 6.* was not founded (as some have supposed) on *H. 6.* being only king *de facto*, but on another point, viz. whether the demise of the crown did not determine the power of coroners, as it does the commissions of judges and other commissioners; and as to *Bagot's* case, if carefully considered, it will but little serve the purpose of such a distinction, for the principal point in that case was concerning the validity of letters patent of denization granted to *Bagot* by *H. 6.* whether they were void by the act of 1 E. 4. let forth in the

pleadings; this point was not argued by the judges, but by the serjeants and apprentices, 9 E. 4. 2. a. it will therefore be necessary to distinguish the discourse of the counsel from the resolution of the court.

Bagot's counsel asserted, "That all judicial acts relating to royal jurisdiction, which were not in diminution of the crown, tho done by an usurper, would nevertheless bind the king *de jure* upon his regrest, that *H. 6.* was not merely an usurper, the crown having been entailed on him by parliament; that *Bagot's* denization was an advantage to the prince on the throne, for the more subjects he had, the better it was for him; and they likened it to the case of recovers suffered in a court-baron, while the disseisor was in possession, which would continue in force notwithstanding the re-entry of the disseisor."

This was all that could be expected for them to say, considering that *E. 4.* was then on the throne, and they were obliged to admit, that grants of the regal revenue made by *H. 6.* were void against *E. 4.* because the act of parliament of *E. 4.* which declared *H. 4. H. 5. and H. 6.* usurpers, vested in *E. 4.* all such manors, castles, honours, liberties, franchises, reversions, remainders, &c. and all hereditaments with their appurtenances, whatsoever they were, in *England, Wales, and Ireland, and in Calais*, as king *Richard II.* had on the feast of *St. Matthew* the twenty-third year of his reign in right of the crown of *England* and lordship of *Ireland*: all meane graunts therefore of such manors, &c. were by this act indisputably defeated.

The counsel on the other side objected, "That the letters patent of denization were void, for that the king ought not to be in a worse condition than a com-

"more"

void of international alienations of royal revenue. The crown under H. 6. was

king within this act, so that compassing his death is treason within this law; and therefore the 4 E. 4. 20. a. (t), a person that compassed the death of H. 6. was attainted for that treason in the time of the rightful king; but had it been an act of hostility in assistance of the rightful heir of the crown (*), which afterwards obtained, this had not been treason, but *é converso* those that assisted the usurper, tho in actual possession of the crown, have suffered as traitors,

“ mon person; and that if a common
“ person were disseised and re-entred, his
“ re-entry would defeat all mesne acts;
“ and that therefore E. 4. being in by descent from king Richard, and this act
“ being but an affirmation of the common
“ law, his regrests would avoid all acts
“ done by the usurper, for which reason
“ provision was made in that act for
“ grants of wards, licences of mortmain,
“ charters of pardon, and judicial acts,
“ but no provision was made for grants of
“ denization; that the patent in controversy was to the disadvantage of the
“ king, since it was not reasonable, that
“ such an alien should be made his subject
“ against his will, for by the same reason
“ H. 6. might have made twenty thousand
“ Frenchmen denizens; that if a league was
“ made between H. 6. and another king, it
“ would not bind E. 4. and yet such
“ league is intended for the advantage
“ of the realm; that an exemption granted
“ by H. 6. from being put upon juries in
“ assises, &c. would now be void.”

Here Billing the chief justice interposed and said, *I do not agree to this*; he added, “ *It pertains to every king by reason of his office to do justice and grace, justice in executing the laws, &c. and grace in granting pardon to felons, and such legitimization as this is.*” Yelverton seemed at first to think that the denization was void, not because the regrests of E. 4. avoided all mesne acts done by H. 6. but because the act of E. 4. resumed all liberties and franchises, and denization being a liberty was therefore resumed.

The cause was adjourned, during which time it was abated by the death of Swirenden one of the plaintiffs; a new assise was brought by Bagot, and the same matter was pleaded as before; the assise was taken, and the verdict was in favour of Bagot 9 E. 4. 5. the defendant's counsel moved in arrest of judgment, and Brian (who was of counsel against Bagot, and not one of the judges) repeated the former objection, that since E. 4. was in possession by remitter, as cousin and heir of king Richard, the patent of denization by H. 6. who was but an usurper and intruder was void, 9 E. 4. 11. but the justices said, that they had con-

ferred upon all points of this case with the justices of the common pleas, and they were all of opinion, that those matters were not sufficient to arrest judgment; and accordingly judgment was given for Bagot 9 E. 4. 12. a. abridged in Br. Patents 31. Denizen 3. Chartre de Pardon 22. Exemption 4. Judgment 42. F. Assise 29. Denizen 1.

From this state of the case it appears, that the question was entirely upon the construction of an act of parliament, and not upon any maxims of common law; and tho it was said, that that act was an affirmation of the common law, yet that was only the saying of counsel, and unsupported by any book-case or record: so that the distinction here taken by our author between a *rex de facto* and a *rex de jure* being no way warranted by the constitution or common law of this kingdom, all that is here said by him on that supposition must fall to the ground.

(t) This case is cited before by our author p. 61. but is somewhat differently related in Stow's Annals, p. 418. Seld. Titles of Honour, cap. 5. p. 654.

(*) But who shall take upon them to determine who that is? Our author therefore prudently adds, *which afterwards obtained*, for this is the most effectual way of deciding questions of this nature; but then by the same rule, *if he should not obtain*, such act of hostility had been treason, for it cannot be imagined, that any prince in the actual possession of the government will suffer his own title to be disputed, nor indeed is it fitting, that private subjects should set themselves up for judges in such an affair, whose duty it is to pay a legal obedience to the powers that are: *fact set over them; for the powers that be, are ordained of God.* Rom. xiii. 1.

This serves to shew how idle the distinction is between a *rex de jure* and a *rex de facto*, which is not only founded on a precarious bottom, but also must in fact prove a distinction without a difference, being equally serviceable to all sides and parties; and thus it was in regard of H. 6. and E. 4. who were both of them by turns declared by parliament to be rightful kings and usurpers,

tors, as appears by the statute of 1 E. 4 (†), and as was done upon the assistants of H. 6. after his temporary re-adeption of the crown in 10 E. 4. and 49 H. 6.

5. A king admitting by act of parliament his son *in consortium imperii*, as was done by H. 2. whereby there was *rex pater* and *rex filius*, only the father reserved to himself the lige homage or alligiance of his subjects, yet the son actually administered the kingdom; the father continued a king, and a treason committed against him by his son or any of his subjects was treason within this [104] act; and so was the son a king within this act, as in reference to all but the father, a subordinate king, that had the *jura imperii*, as the king of Scots was after his homage done to king Edward I. and therefore compassing his death by any of his subjects had been high treason within this act, if it had been then made; for it is mistaken in lord Coke's *P. C. p. 7.* that H. 2. resigned his crown, for he continued still *rex de facto & de jure*, as Hoveden tells us. *Vide supra cap. 10.*

Having thus shewn who is a king within this act, we shall the more easily see who is not a king within this act.

1. The right heir of the crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a king within this act; such was the case of the house of York during the plenary possession of the crown in H. 4. H. 5. H. 6. but if the right heir had once the possession of the crown as king, tho an usurper hath gotten the possession thereof, yet the other continues his style, title and claim thereunto, and afterwards re-obtains the full possession thereof, a compassing the death of the rightful heir during that interval, is a compassing of the king's death within this act, for he continued a king still, *quasi* in possession of his kingdom; this was the case of E. 4. in that small interval, wherein H. 6. re-obtained the crown, and the case of E. 5. notwithstanding the usurpation of his uncle R. 3.

2. If a king voluntarily resign, as some in other countries have done, and this resignation admitted and ratified in parliament, he is not afterwards a king within this act (u); but we never had such an example in England, for that of R. 2. was a constrained act, touching

(†) This must have been for acts before E. 4. first obtained the crown, and therefore was wrong according to our author's own doctrine, because, as he says below,

even the rightful heir before he has got possession of the crown is not a king within the statute of 25 E. 3.

(u) The same reason holds in the case of a king,

ing which and the deposition of *E. 2.* I shall not say farther, for they were acts of great violence and oppression.

[105] Only thus much is certain, that altho *E. 2.* had a kind of pretended deposing, and his son *E. 3.* took upon him the kingly name, and office, yet in the opinion of those times *E. 2.* continued, as to some purposes, his regal character, for in the parliament of 4 *E. 3.* *Mortimer, Berisford, Guernsey*, and others had judgment of high treason given against them for the death of *E. 2.* after his deposition.

Neither was this judgment grounded simply upon that old opinion in *Britton* (*x*), that killing of the king's father was treason; for, tho in some parts of that record, as in the judgment of the *Yards* against *Mortimer*, the words are, *Touchant le mort seigneur Edward pere nostre seigneur le roy, qe ore est,—countes, barons, & peres, come jugges de parlement, agarderent & adjudgerent le dit Roger, come trefor & enemy de roy & de realme, feust treine & pendu*; yet in other parts of that roll of parliament he is styled at the time of his murder *seignior feige*, and sometimes *rex*, as *n. 6.* The lords make their protestation, that they are not to judge any but their peers; yet they declare that they gave judgment upon some that were not their peers, in respect of the greatness of their crimes; *et ce per encheson de murder de seigneur lige, &c.* and in the arraignment of *Thomas* lord *Berkele* for that offense, the words of the record are, *Qualiter se velit acquietare de morte ipsius domine regis*, who pleaded, *Quod ipse de morte ipsius domini regis in nullo est inde culpabilis*; and the verdict, as it was given in parliament, 4 *E. 3. n. 16.* and the record is, *Quod prædictus Thomas in nullo est culpabilis de morte prædicti domini regis patris domini regis nunc*; so that the record styles him *rex* at the time of his death, and yet every one acquainted with history knows, that his son was declared king, and took upon him the kingly office, and title upon the twenty-fifth, or, according to *Walsingham*, the twentieth of January; and *E. 2.* was not murdered till the twenty-first of September following.

I have been the longer in this instance, tho it were before the making of the statute of 25 *E. 3.* when treason was determined

a king, who is deemed by parliament to have abdicated, or by actions subversive of the constitution virtually to have renounced the government; this was the case of king *James II.* who, tho not in words, yet by

acts and deeds equally expressive had renounced holding the crown upon the terms of the constitution.

(*x*) *Brit. cap. 22. Co. P. G. op. 7.*

according to the common law, that it may appear, that this judgment was not singly upon this account, that he was father to king *E. 3.* but that notwithstanding the formal deposing of him, and that pretended or extorted resignation of the crown mentioned by the histories of that age, yet they still thought the *character regis* remained upon him, and the murder of him was no less than high treason, namely, the killing of him who was still a king, tho deprived of the actual administration of his kingdom.

3. The husband of a queen regent is not a king within this law, for the queen still holds her sovereignty entirely, as if she were sole: *vide 1 Mar. cap. 2. sess. 3.* and for the remedy thereof there was a special temporary act made enacting and extending treason as well to the compassing of the death of king *Philip* of *Spain* husband to queen *Mary*, as of the queen, and for the making of other acts against the king, as against the queen, within the compass of high treason, during the continuance of the marriage between them. *1 & 2 Phil. & Mar. cap. 10.* so that it seems, tho the husband of a queen regent be as near to him, as the wife of a king regnant, the statute of *25 E. 3.* declaring the compassing of the death of the king's wife to be treason, did not extend to the husband of a queen regent (y).

4. A *prorex*, *viceroi*, *custos regni*, or *justiciarius Angliæ*, which import in substance the same office, *viz.* the king's lieutenant in his absence out of the kingdom, is not a king within this act (z), tho his power be very great, and all commissions, writs and patents pass under his *tesse*; and the same law is touching the lord lieutenant or *justiciarius Hiberniæ* or his deputy. *Vide statut. Hiberniæ.*

Rot. Parl. 31 H. 6. n. 38 & 39. *Richard* duke of *York* by the king's letters patent, and by consent of parliament, was constituted *protector & defensor regni, & ecclesiæ Anglicanæ, & consiliarius regis principalis* till the full age of the prince, or till discharged of that employment by the king in parliament by the consent of the lords spiritual and temporal; tho this were a high office, and exceeded much the power of a protector of the king during his minority, such as were the earl of *Pembroke* to *H. 3.* and the duke of *Somerfet* to *E. 6.* yet this protector was not a king within [107] this statute.

III. I come to the third division, what shall be said *a compassing or imagining of the death* of the king, queen, or prince.

The words *compass or imagine* are of a great latitude.

1. They refer to the purpose or design of the mind or will, tho the purpose or design take not effect.

2. Compassing or imagining singly of itself is an internal act, and without something to manifest it, could not possibly fall under any judicial cognizance, but of God alone; and therefore this statute requires such an overt-act, as may render the compassing or imagining capable of a trial and sentence by human judicatories.

And yet we find that other laws, as well as ours, make compassing or conspiring the death of the prince to be *crimen læsæ majestatis*, tho the effect be not attained.

Ad legem Juliam majestatis in Codice (a) in the law of *Honorius* and *Arcadius*, *Quisquis cum militibus, vel privatis, vel barbaris sceleratam inierit factionem, vel factionis ipsius suscepit sacramentum vel dederit, de nece etiam virorum illustrium, qui consiliis & consilio nostro intersunt, senatorum etiam (nam & ipsi pars corporis nostri sunt), vel cujuslibet postremo, qui nobis militat, cogitaverit, (eadem enim reverentia voluntatem sceleris, quâ effectum, puniri jura voluerunt) ipse quidem, utpote majestatis reus, gladio feriat, bonis ejus omnibus fisco nostro additis.*

A bare accidental hurt to the king's person, in doing a lawful act, without any design or compassing of bodily harm to the king, seems not a compassing of the king's death within this act.

Walter Tirrel by command of *William Rufus* shot at a deer; the arrow glanced from an oak, and killed the king; *Tirrel* fled, but this being purely accidental, without intention of doing the king any harm, hath been held not to be a compassing of the king's death. *Co. P. C. p. 6. Paris & Hoveden anno ult. Willielmi secundi.*

[108] Calculating of the king's nativity, or thereby or by witchcraft, &c. seeking to know, and by express words, writing, &c. publishing and declaring how long the king shall live, or who shall succeed him, or advisedly or maliciously to that intent uttering any prophecies, seems not a compassing of the king's death within the statute of 25 E. 3. (b), but was made felony during the life of

(a) Lib. IX. tit. 8. l. 5. pr.

(b) Even before that statute, viz. Hil. 18. E. 2. Rot. 24. rex coram rege, there was an instance of several persons charged with endeavouring to compass the king's

death by necromancy by making his image in wax, &c. yet they were appealed only de felonio & maleficio, and were all acquitted by the jury.

queen *Elizabeth* by 23 *Eliz. cap. 2.* and before that, was only punishable by fine and ransom. *Co. P. C. p. 6.*

Compassing the death of the king is high treason (*c*), tho it be not effected; but because the compassing is only an act of the mind, and cannot of itself be tried without some overt-act to evidence it, such an overt-act is requisite to make such compassing or imagination high treason. *De quo infra.*

IV. Therefore as to the *overt-act* in case of compassing the death of the king, queen, or prince.

1. Tho the words in the statute of 25 *E. 3.* *and be provably thereof attaint by open deed, &c.* come after the clause of levying of war, yet it refers to all the treasons before-mentioned, *viz.* compassing the death of the king, queen, or prince. *Co. P. C. 6. 12.* and therefore what is said here concerning the compassing of the death of the king is applicable to queen and prince. •

And therefore in an indictment of treason for compassing the death of the king, queen, or prince, there ought to be set down both the treason itself, *viz.* *Quod proditorie compassavit & imaginatus fuit mortem & destructionem domini regis, & ipsum dominum regem interficere,* and also the overt-act, *& ad illam nefandam & proditoriam compassationem & propositum perimplend'*, and then set down the particular overt-act certainly and sufficiently, without which the indictment is not good. *Co. P. C. p. 12.*

2. If men conspire the death of the king and the manner, and thereupon provide weapons, powder, harness, poison, or [109] and letters for the execution thereof; this is an overt-act within this statute. *Co. P. C. p. 12.*

3. Tho the conspiracy be not immediately and directly and expressly the death of the king, but the conspiracy is of something that in all probability must induce it, and the overt-act is of such a thing as must induce it; this is an overt-act to prove the compassing of the king's death, which will be better explained by the instances themselves, and therefore,

4. If men conspire to imprison the king by force and a strong hand, till he hath yielded to certain demands, and for that purpose gather company or write letters, this is an overt-act to prove the compassing of the king's death, for it is in effect to despoil him of his kingly

(*c*) Inasmuch that where the king is actually murdered, it is the compassing his death which is the treason, and not the killing, which is only an overt-act. *Kel. 8.*

government, and so adjudged by all the judges in the lord *Cobham's* case, 1 *Jac. (d)* and in the case of the Earl of *Essex*, 43 *Eliz. (c)*, *Co. P. C. p. 12.* But then there must be an overt-act to prove that conspiracy to restrain the king, and then that overt-act to prove such a design is an overt-act to prove the compassing the death of the king.

But then this must be intended of a conspiracy *forcibly* to detain or imprison the king; and therefore, when in the time of *R. 2.* in parliament a commission was somewhat hardly gotten from the king, which seemed to curb his prerogative too much, the answer of the judges to the general question, "*Qualem pœnam merentur illi, qui compulerunt sive arctarunt regem ad consentiendum dicti statuti ordinis nationis & commissionis? ad quam questionem unanimiter responderunt, quod sunt, ut proditores, merito puniendi, Rot. Parl. 11. R. 2. (f).*" was too rash and inconsiderate, and for which the judges themselves were condemned as traitors, as before is shewn (*g*); for *compulerunt* and *arctaverunt* may have a double construction; either it may be intended of an actual force used upon the person of the king, as by restraint, imprisonment, or injury to his person, to enforce his consent to that commission; and then it had not differed from the execrable treason of the *Spencers*, who declared, that since the king could not be reformed by suit of law, it ought to be done *per aspertee*, for which they were banished by two acts of parliament (*h*). *Vide 7 Co. Rep. fol. 11. in Calvin's case.* 2. Or it might be intended, not of a personal compulsion upon the king, but by not granting supplies, or great persuasion or importunity, and then it could not be treason; the latter whereof was the only compulsion or arctation, which was used for the obtaining that commission.

And therefore the judges that delivered that opinion, were inexcusable in their decision of treason under such ambiguous and large expressions of *compulerunt & arctaverunt*; and tho the parliament of 11 *R. 2.* was repealed by 21 *R. 2.* yet that again was repealed 1 *H. 4. cap. 3.*

5. A conspiring to depose the king, and manifesting the same by some overt-act, is an overt-act to prove the compassing of the death

(d) *State Trials, Vol. I. p. 206.*

(e) *State Trials, Vol. I. p. 199.*

(f) *State Trials, Vol. I. p. 9.*

(g) *cap. 11. p. 94.*

(h) One in the reign of Edward II. called *Exilium Hugonis le Spencer*; and the other in anno 1 Edward III. *cap. 1.*

of the king within this act of 25 E. 3. *Vide* 1 Mar. B. Treason 24. (i) Co. P. C. p. 12.

It is true, that by the statute of 21 R. 2. Ca. 3. it was enacted, *That every man that compasseth or purposeth the death of the king, or to depose him, or to render up his homage liege, or he that raiseth people, and rideth against the king to make war within his realm, and of that be duly attainted and adjudged in parliament, shall be adjudged as a traitor of high treason against the crown; and this act is particularly repealed by the statute of 1 H. 4. cap. 10. as a great snare upon the subject; for it is retited, that by reason thereof no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason.*

But the true reason was not in regard of the four points themselves, for many of them were treasons within the sta- [111] tute of 25 E. 3. but that wherein the act of 21 R. 2. varied from the act of 25 E. 3. were these: 1. That the compassing to levy war is made treason by the statute of 21 R. 2. whereas the levying of war only was treason by 25 E. 3. Again 2dly, Tho compassing the death of the king was treason within the letter of 25 E. 3. and compassing to depose him was an evidence or overt-act of a compassing of the king's death within the meaning of the act of 25 E. 3. yet both required an overt-act. The statute of 21 R. 2. makes the bare purposing, or compassing, treason, without any overt-act; and tho it restrains the judgment thereof to the parliament, yet it was too dangerous a law to put men's bare intentions upon the judgment even of parliament under so great a penalty, without some overt-act to evidence it: this was one reason of the repeal of the treasons declared by the statute of 21 R. 2. But this was not all, for in that parliament of 21 R. 2. the resolutions of the judges to the questions propounded by the king are entered at large, and received an approbation not only by the suffrage of some other judges and serjeants, but by the statute made in the same parliament, as appears at large by the statute of 21 R. 2. cap. 12.

(i) Broke makes this quere: "*Quere vel deprive, car home post depriver, & uncore intends null morte, & pur cōt cause un statute fuit ent fait tempore H. 8. & E. 6. Nota.*" The statutes here referred to are 26 H. 8. cap. 13. by which it was made high treason "*to wish or desire by words or writing, or to imagine, invent, or attempt to deprive the king, the queen, or their heirs*

apparent of the dignity, title, or name of their royal estates." And 1 E. 6. cap. 12. by which it was made highly penal (for the third offense high treason) "*to compass or imagine by open preaching, express words or sayings, to depose or deprive the king, his heirs, or successors, kings of this realm, from his or their royal estate or titles, or of the realm aforesaid.*"

And

And therefore, wholly to remove the prejudice that might come to the king's subjects by those rash and unwarrantable resolutions, the statute of 1 *H. 4. Ca. 10.* was made, reducing treasons to the standard of 25 *E. 3.* and the entire parliament of 21 *R. 2.* also repealed as appears 1 *H. 4. Ca. 3.*

6. Regularly words, unless they are committed to writing, are not an overt-act within this statute. *Co. P. C. p. 14. (k)*; and the [112] reason given is, because they are easily subject to be mistaken, or misapplied, or misrepeated, or misunderstood by the hearers (*l*).

And this appears by those several acts of parliament, which were temporary only, or made some words of a high nature to be but felony. *Co. P. C. cap. 4. p. 37.* The statute of 3 *H. 7. cap. 14.* makes conspiring the king's death to be felony; which it would not have done, if the bare conspiring without an overt-act had been treason.

26 *H. 8. cap. 13.* malicious publishing by express writing or words, that the king were an heretic, schismatic, tyrant, infidel, or usurper, enacted to be high treason (*m*).

1 *E. 6. cap. 12.* If any person or persons do affirm or say forth by open preaching, express words or sayings, that the king, his heirs or successors, is not or ought not to be supreme head of the church of *England* and *Ireland*; or is not or ought not to be king of *England*, *France*, and *Ireland*; or do compass or imagine by open preaching, express words or sayings to depose or deprive the king, his heirs or successors from his or their royal estate or titles aforesaid, or do openly publish or say by express words or sayings, that any other person or persons, other than the king, his heirs or successors, of right ought to be kings of this realm; every such offender being convicted, for his first offense shall forfeit his goods, and be im-

(*k*) *Wise Co. P. C. p. 38, 140.* The passages quoted *S. P. C. 2. b.* from *Bracton* and *Britton*, only describe the form of accusation, but are far from proving that words alone were, in the opinion of those writers, a sufficient evidence of treason; but if they were so at common law, yet it does not follow, that they would be so by the statute of 25 *E. 3.* which expressly requires the proof of an overt-act, and consequently disallows the evidence of bare words, for words and acts are contra-distinguished from each other. See *Co. P. C. 14. in margine.* The preamble of 1 *Marie, cap. 2. sess. 1.* makes it matter of complaint,

that many had for words only suffered shameful death.

(*l*) This is one but not the only reason, for another reason was, because in a passion or heat might say many things, which they never designed to do; the law therefore required, that in a case of so nice a nature, where the very intention was so highly penal, the reality of that intention should be made evident by the doing some act in prosecution thereof.

(*m*) This same statute makes it high treason to wish or desire by words or writing to deprive the king of his dignity.

prisoned during the king's pleasure; for the second offense shall lose his goods and the profits of his lands during life, and shall suffer imprisonment during life; and the third offense is made high treason.

But if this be done by writing (*n*), printing, overt-deed, or act, then every such offense is high treason by the act of 25 E. 3.

So much of this act, as concerns any thing in derogation of the papal supremacy, is repealed by the statute of 1 & 2 Ph. ^[113] & M. cap. 8. And so much, as concerns treason, farther than it stands settled by 25 E. 3. is repealed by the statute of 1 Mar. cap. 1. sess. 1. But the rest of this act, that concerns only misdemeanors, stands perpetual, as it seems.

By 1 & 2 P. & M. cap. 9. Prayers by express words, that God would shorten the queen's days, or take her out of the way, or such like malicious prayer, amounting to the same effect, made treason; but if person penitent upon his arraignment, no judgment to ensue (*o*); the like provision is made during the queen's life by 23 Eliz. cap. 2.

1 & 2 P. & M. cap. 10. Compassing to levy war against the queen, or to depose her or the heirs of her body, and maliciously, advisedly, and directly uttering such compassing by open preaching, express words or sayings; and also affirming by preaching, express words or sayings, maliciously, advisedly and directly, that the queen ought not to be queen of this realm, is punishable by loss of goods and chattels, whole profits of the offender's lands during life, and perpetual imprisonment; and the second offense is made high treason; but if it is done by writing, printing, or overt-act, then it is made high treason.

1 Eliz. cap. 5. the same act almost *verbatim* for the safety of queen Elizabeth and the heirs of her body.

By 13 Eliz. cap. 1. Compassing the death or bodily harm of the queen, or to deprive her of the imperial crown, or to levy war against her; and such compassing, maliciously, expressly or advisedly uttered or declared by printing, writing, cyphering, speech, words or sayings;

(*n*) This is said by lord Coke, P. C. 14. and in *Sidney's case*, State Tr. Vol. III. p. 733. it is said, *scribere est egere; quære tamen*, for if our author argues rightly, that words were not treason by 25 E. 3. because there needed new acts to make them so in particular cases afterwards, the same argument holds good with respect to

writing, especially if not published; for there were also new acts to make that treason.

(*o*) This last clause extended to such only, who had been guilty during that session of parliament, for the act had a retrospect to the beginning of the session.

and also malicious, advised and direct publishing and declaring by express words or sayings, that she ought not to be queen, that she is an heretic, schismatic, tyrant, infidel, or usurper, is made high treason in the principal, procurers and abettors (p).

[114] 14 *Eliz. cap. 1.* Compassing to take, or detain, or burn the queen's castles, and such compassing declared by any express words, speech, act, deed, or writing, is made felony; but the actual taking, or with-holding, or burning them, is made treason.

13 *Car. 2. cap. 1.* Compassing the death of the king or any bodily harm tending to his wounding, imprisonment, or restraint, or to depose him, or to levy war against him, or to stir foreigners with force to invade the kingdom, and such compassing declared by printing, writing, preaching or malicious and advised speaking, is made high treason: publishing or affirming the king to be an heretic or a papist, or that he endeavours to bring in popery; or inciting the people by writing, printing, preaching, or other speaking to hatred of his majesty or the government, disables to hold office (q).

By all which it seems, that regularly, 1. words of themselves cannot make high treason; 2. words of themselves are not a sufficient overt-act within the statute of 25 E. 3. to serve an indictment of compassing the king's death.

And with this agrees that notable case of Mr. Pyne in Croke's reports, T. 4 *Car. (r)* the words of which are these, "*Upon consideration of the precedents of the statutes of treason it was resolved by the seven judges there named, and so certified to his Majesty, that the speaking of the words there mentioned, tho they were as wicked as might be, were not treason; for they resolved, that, unless it were by some particular statute, no words will be treason; for there is no treason at this day, (viz. 4 Car. 1.) but by the statute of 25 E. 3. for imagining the*"

[115] "*death of the king, &c. and the indictment must be framed upon one of the points in that statute; and the words spoken*"

(p) "The indictments and attainders of treason by force of this statute are not more to be followed; because the statute, which made them good, is expired." *Co. P. C. p. 10.* in the margin.

(q) No penalties are to be incurred by this act, unless the prosecution be within six months next after the offense committed. See also the 4 *Ann. cap. 8.* and 6 *Ann. cap. 7.* whereby it is made high treason to declare by writing or printing, that the queen is not lawful or rightful queen, or that any other person hath right to the crown other wise than according to the acts

of settlement, or that the kings or queens of this realm by authority of parliament are not able to make laws of sufficient force and validity to bind the descent of the crown: persons who declare the same by preaching or advised speaking incur a *præmunire*; but no prosecution to be for words spoken, unless information be given upon oath before a justice of peace within three days after, and the prosecution be within three months after such information.

(r) *Cro. Car. 125.*

"there

"there can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them."

Baker in his *Chronicle*, p. 229. tells us of two very hard judgments of treason given in the time of E. 4. viz. that of *Walter Walker*, dwelling at the sign of the crown in *Cheapside*, who told his little child if he would be quiet, he would make him heir of the crown: the other of *Thomas Burdett* (f), who having a white buck in his park, which in his absence was killed by E. 4. hunting there, wished it, horns and all, in his belly that counselled the king to kill it; whereas in truth none counselled him to it, but he did it of himself: for these words both these were attaind of high treason, and executed: tho *Markham* chief justice rather chose to leave his place, than assent to this latter judgment. Vide indictment of treason for treasonable words, P. 3 H. 4. Rot. 4. & 12. *Walton's* case and *Southe's* case (t).

Therefore tho this be regularly true, that words alone make not treason or an overt-act, yet it hath these allays and exceptions.

(1.) That words may expound an overt-act to make good an indictment of treason of compassing the king's death, which overt-act possibly of itself may be indifferent and unapplicable to such an intent; and therefore in the indictment of treason they may be joined with such an overt-act, to make the same applicable and expostive of such a compassing, as may plainly appear by many of the precedents there cited (u).

(2.) That some words, that are expressly menacing the death or destruction of the king, are a sufficient overt-act to prove that compassing of his death, *M. 9 Car. B. R. Crohagan's* case in [116] *Croke* (x), who being an *Irish* priest, 7 Car. 1. at *Lisbon* in *Portugal* used these words, "I will kill the king (innuendo dominum Carolum regem Angliæ) if I may come unto him," and in Aug. 9 Caroli he came into *England* for the same purpose (y). This was proved upon

(f) See *Rapin's* history sub anno 1478. who mentions it in the same manner; but it appears from the indictment in *Cro. Car.* 120. that he was indicted for calculating the king's and prince's nativity, and declaring that they would not live long; and also for publishing seditious rhimes and ballads, altho this was not treason, and was therefore made felony during queen *Elizabeth's* life, by 23 *Eliz. cap. 2. Co. P. C.* p. 6.

(t) *Louth's* (not *South's*) and *Walton's* case are *Trin. 3 H. 4. coram rege* ret. 4. and P. 3 H. 4. coram rege rot. 12. in *Sperbank's*

case, who was also convicted of treason for scandalous words.

(u) In *Pyne's* case.

(x) *Cro. Car.* 332.

(y) This case does by no means prove, that words alone are a sufficient overt-act, for here were not only threatening words, but also an act done in order to put that threatening in execution; so that, as our author admits, it comes more properly under the former head; the resolution therefore in *Kelyng* 13. that words are an overt-act, which is founded on this case, must fall to the ground.

his trial by two witnesses, and for that his traitorous intent and the imagination of his heart was declared by these words, it was held high treason by the course of the common law, and within the express words of the statute of 25 E. 3. and accordingly he was convicted, and had judgment of high treason; yet it is observable, that there was somewhat of an overt-act joined with it, namely, his coming into *England*, whereby it seems to be within the former consideration, namely, tho the coming into *England* was an act indifferent in itself, as to the point of treason; yet it being laid in the indictment, that he came to that purpose, and that in a great measure expounded to be so by his minatory words, the words coupled with the act of coming over make his coming over to be probably for that purpose, and accordingly applicable to that end.

To say that the king is a bastard, or that he hath no title to the crown, is held high treason. *M. 5 Jac. Yelvert. 197. Blanefflower's case, & ibidem Hill. 8 Jac. Berisford's case (x).*

[117] P. 13 Jac. B. R. (a) *John Owen alias Collins* was indicted of treason, for that he, intending the king's death, *falso & malitiosè* spake these words of the king: *The king being excommunicate by the pope may be lawfully deposed and killed by any whatsoever, which killing is not murder*; and being demanded by *Henry White*, how he durst utter such a bloody and fearful conclusion, *Owen* answered, *The matter is not so heinous, as you suppose, for the king being the less is concluded by the pope being the greater; and it is all one as a malefactor being convicted by a temporal judge is delivered to execution, so the king being convicted by the pope may be lawfully slaughtered by any whatsoever, for this is the execution of the supreme sentence of the pope, as the other is the execution of the law*: to this indictment he pleaded not guilty; and it was ruled to be high treason by *Coke chief justice* and all the Court; and being found guilty he had judgment to be hanged, drawn and

(x) This case is likewise reported *Cro. Jac. 275. and 1 Bull. 147.* but both the cases quoted here by our author, were actions for scandalous words, and the single point in judgment before the court was, whether the words were actionable, and even as to that *Yelverton* and *Croke* in *Berisford's case* differed from the other judges; so that none of these cases prove, that bare words are an overt-act of treason within 25 Ed. 3. indeed where any one not only utters words declaring his own thoughts,

but endeavours by promises of reward or other arguments to persuade another to kill the king, or the like, this has been construed an overt-act of treason, because here is something besides the words, here is an attempt to draw another into the design, and is as much an overt-act as an agreement or a consultation how to effect it. *Lord Stafford's case, State Tr. Vol. III. p. 208. Charnock's case, State Tr. Vol. IV. p. 581. 2 Salk. 631.*

(a) 1 Roll. Rep. 185.

quartered (*b*). And here it was said by the king's attorney (*c*) upon the evidence, and not denied by the court, 1. that the statute of 25 *E.* 3. as to compassing the king's death was but an affirmance of the common law. 2. That it is treason by the laws of all nations; and therefore an embassador for compassing the king's death shall be executed here for treason; but for other treasons shall be remitted into his own country to be tried. 3. That words of this nature spoken *de futuro* have been adjudged high treason presently; and therefore it was there said to be adjudged in the time of *H. 8.* in the case of the duke of *Bucks*, that these words were high treason, *If the king should arrest him of high treason, he would stab him*; (*vide* case *de* duke *Bucks*, 13 *H. 8.* 11. *b.* 12. *a.* where there are other words also (*d*);) and in the case of another, *If H. 8. will not take again queen Catherine as his wife, he shall not be king* (*e*); and in the case of *Stanley*, *Temp. H. 7. That if Pierce Warbeck were the son of E. 4.* [118] *he would take part with him against H. 7.* (*f*).

And note, that king *James* had been long excommunicate by the pope, and that every *Maunday Thursday* the pope excommunicates all *Calvinists*, &c. and all that have withdrawn their obedience from the pope: *Owen* was executed accordingly. *Vide* *in* (*g*) the whole judgment and particulars and consequence thereof.

(*b*) These words, tho very wicked and of a mischievous tendency, and therefore an high misdemeanor, yet unless accompanied with some circumstances to show that they were made use of in order to persuade somebody to kill the king, cannot according to the resolution in *Perkin's* case amount to an overt-act of high treason, for they are not any act at all, and besides might be said by a bigotted papist, in the height of his ignorant zeal, without intending or imagining the death of the king.

(*c*) *Bacon*.

(*d*) There was also somewhat of an overt-act joined with the words; for being told by a monk, that he should be king, and commanded to obtain the good will of the commonalty, he was accused of giving certain robes for that intent: this duke's case was counted hard, and his fate is lamented by the reporter.

(*e*) This was the case of *Elizabeth Barton*, the holy maid of *Kent*: the words as related by lord *Bacon* in his history of *Henry VII.* p. 134. were these: "That if king Henry the eighth did not take Catharine his wife again, he should be deprived of his crown, and die the death of a dog." She and her accomplices were attainted of

treason by a particular act of parliament, viz. 25 *H. 8.* cap. 12. upon which lord *Coke* observes, *Co. P. C.* 14. that they could not have been attainted of treason within 25 *E.* 3.

(*f*) Lord *Bacon* in his history of *Henry VII.* p. 134. reports, that the criminal words, for which *Stanley* was accused, were these; "That if he was sure, that the young man (*Perkin Warbeck*) were king Edward's son, he would never bear arms against him." Upon which the historian makes this observation; "This case seems somewhat an hard case, both in respect of the conditional, and in respect of the other words, &c."—But (says he) "Some writers do put this out of doubt; for they say, that *Stanley* did expressly promise to aid *Perkin*, and sent him some help of treasure." And it appears by the record of *Stanley's* indictment quoted in *Cro. Car.* p. 123. that he was accused not only of words, but of an express agreement and conspiracy to bring in *Peter Warbeck* and make him king. Note, That the lord *Bacon*, whose history is here quoted, is the attorney general mentioned in *Owen's* case.

(*g*) 1 *Roll. Rep.* 185.

7. Those words, which being spoken will not make an overt-act to make good an indictment of compassing the king's death; yet, if they are reduced into writing by the delinquent either letters or books, and published (*h*), will make an overt-act in the writer to make good such an indictment, if the matters contained in them import such a compassing (*i*). Co. P. C. p. 14.

Instances of this kind are many in 4 *Car. Croke*, *ubi supra*: but I shall instance particularly only in *Williams's case*, P. 17 *fac. B. R.* (*k*).

[119] *Williams* wrote a book, intituled *Balaam's Ass* (*l*), in which there were many things reproachful and dangerous to the king, and among others, *that the king should die anno domini 1621. and that the realm should be destroyed, because it was anti christian and the abomination of desolation*: this book he inclosed and sealed up in a box, and sent it to the king (*m*), and for this he was indicted and attainted and executed for high treason, *vide Co. P. C.* 14. concerning words, where it is said thus: "*But if the same be set down in writing by the delinquent himself, this is a sufficient overt-act within this statute.*" And the same law it is, if it be set down in writing by any other by his command or direction.

8. If there be an assembling together to consider how they may kill the king, this assembling is an overt-act to make good an indictment of compassing the king's death. This was *Arden's case* (*n*), 26 *Eliz.* and accordingly it was ruled *Decem. 14 Caroli* at *Newgate* in the case of *Tonge* and other confederates (*o*).

By my lord *Coke's* opinion, *Co. P. C.* 14. "A conspiracy to levy war is no treason by the statute of 25 *E. 3.* till war be levied;"

(*b*) In *Peacham's case* quoted in *Cro. Car.* 125. an unpublished writing was admitted in evidence as an overt-act of treason; the like in the case of *Col. Sidney*, *State Tr.* Vol. III. p. 710. but both those cases were unwarrantable; as to the first it does not appear there was any judgment, for the book lays it was against the opinion of many of the judges, and the latter was resolved at a time of day, when the resolution of the judges in such an affair ought to be but little regarded; that judgment was accordingly reversed by act of parliament, 1 *W. & M.*

(*i*) As *was* *Town's case*, *Kelyng* 22. for report says, that the people were exhorted by that book to put the king to death. *State Tr.* Vol. 2. p. 524.

(*k*) This case (which seems a very hard

one) is reported, 2 *Rob. Rep.* 83. and is quoted, *Cro. Car.* 125.

(*l*) He wrote two books, one called *Balaam's Ass*, and the other *Speculum Regale*.

(*m*) In this case was first broached that famous doctrine, *scribere est agere*. The court went so far as to declare it to be their opinion, that if this book had been found in his study, it would have been a sufficient evidence of the treason, for which he was indicted; but this case destroys its own authority by going too far, for they agreed it to be a clear point, that bare words might amount to treason; strange construction of the statute of 25 *Ed. 3.*

(*n*) *Anderson*, pars I. p. 104.

(*o*) *Kelyng* 17. *State Tr.* Vol. II. p. 474.

and there have been several particular and temporary acts, that make the conspiracy to levy war treason, as well as compassing the king's death. And therefore he saith, "That it hath been resolved, 25 Eliz. " that conspiracy to levy war against the king shall not be said an " overt-act, to serve an indictment for the compassing the king's death, " because the clauses concerning compassing of the king's death, and that " of levying war, are distinct clauses, and declare distinct treasons; and " therefore the latter shall not be an overt-act to serve the former, be- " cause this were to confound several classes or *membra dividenda* of " high treason."

And yet in the same book, p. 12. the case of the earls of *Essex* and *Southampton*, 43 Eliz. are cited, which seem to con- [120] tradict that opinion: the words are, "*That the said earls intended to go to the court where the queen was, and to have taken her into their power, and to have removed divers of her council, and for that end did assemble a multitude of people; this being raised to the end afore- said was a sufficient overt-act for compassing the death of the queen;*" which seems to contradict what is elsewhere by him said (p).

And he that shall read the proceeding against the duke of *Norfolk* set forth at large by *Camden* Eliz. sub anno 1572. p. 170. & *sequen- tibus*, will find, that not only the conspiring with a foreign prince to invade this kingdom, and signifying it to him by letters, is an overt-act to maintain an indictment for compassing the queen's death: but that the duke's purpose to marry the queen of *Scotland*, who had formerly laid claim to the crown of *England*, and signifying it by letters, and all this done without the consent of the queen of *England*, was held an overt-act to depose the queen of *England*, and to compass her death; for if the queen of *Scots* claimed the crown of *England*, he, that married her, must be presumed to claim it also in her right, which was not consistent with the safety of the queen of *England*, and her title to the crown; and altho this extending of treason (as to this point of marriage) by illation and consequence was hard (q); yet the duke was convicted and attaint of treason generally upon this indictment, tho there are likewise some other crimes charged in the indictment.

(p) I do not see how this contradicts what is said by lord Coke, p. 14. for here was an express design to put the person of the queen under a force; nay it had proceeded farther than a design, for there was a multitude actually assembled for that end.

State Tr. Vol. I. p. 190.

(q) According to lord Coke's understanding of the statute of 25 Ed. 3. it was not only hard but illegal, for by that statute no one ought to be convicted by inferences or illations. Coke. P. C. p. 12.

I will therefore set down the resolutions of the judges 1663. touching those, that were assembled in *Yorkshire* at *Farley Wood* (r), divers of whom were after indicted, and attainted of high treason for compassing the death of the king: the resolution was in [121] these words, as I have transcribed it *verbatim* out of a *MS.* of my lord keeper *Bridgman* then chief justice of the *C. B.* who was present at the conference, *Fuit agree par les justices sur conference touchant ceux, queux assemble eux in Farley Wood in Yorkshire 1663, que sur indictment pur compassing mort le roy overt fait poet estre layd in consulting a levyer guerre contre lui (que est overt-act de soy mesme) & actual assembling, & levying guerre: Et ou Co. P. C. 14. dit, " Que conspiracy a levyer guerre nest treason, tanque soit levyed, & pur " ceo nest overt-act, ou manifest proove de compassing mort le roy, car " le parols sont, (de ceo) i. e. compassing mor le roy, & ceo soit a con- " founder le several classes, ou membra dividenda:" Uncor si ley est contra; & issint fuit resolve per tous les justices & council de roy in le case des regicides, Venner, Tonge & Vane (f), qe sur indictment de compassing de mort le roy, consulting a levyer guerre, ou actual assembling de guerre fueront evidence, & overt faits provant compassing mort le roy; & ceo appeirt in Co. P. C. 14. " Si subject conspire ove " forein prince de invader le realm; & prepare pur ceo per overt fait, " ceo est sufficient overt-act pur mort le roy: Et ibidem p. 12. " Le " count de Essex & South' intended daler al court, & daver prise la " reigne en leur power, & remover ascun de council, & a ceo fine as- " sembled multitude de people; this being raised for the end aforesaid " fuit sufficient overt-act pur compassing de mort le roy," queux 2 cases " sont expresse contrary al primer.*

Fuit auxi agree, que si un overt-act soit lay en le enditement, & le proof est dun autre overt-act de mesme le kinde, ou species de treason, ceo est assets bone evidence.

I must confess, that I could never assent to this last part of the resolution: tho I know it was so practised in criminal cases in the star-chamber, for I have always thought, 1. That the overt-act is an essential part of the indictment. 2. As it must be laid, so it must be proved (t); for otherwise, if another act than what is laid should be sufficient, the prisoner would never be provided to make his [122] defence. 3. That more over-acts than one may be laid in

(r) *Kelyng* 19.

(f) *Kelyng*, 20, 21.

(t) *Kelyng* 8. is *contra*, however this point is put out of all doubt by 7 *W.* 3.

cap. 3. §. 8. whereby it is provided, that no evidence shall be given of any overt-act, which is not expressly laid in the indictment.

an indictment, and then the proof of any of them so laid, being in law sufficient overt-acts, maintains the indictment. 4. That if any overt-act be sufficiently laid in the indictment, and proved, any other overt-acts may be given in evidence to aggravate the crime and render it more probable.

This resolution, as to the point of compassing the king's death, being the latter and of great weight, and more than twice practised (*u*), ought to out-weigh the opinion before cited, and with this agrees the resolution of 13 *Eliz. Dyer* 298. *b.* in Dr. *Storie's* case, who conspired with a foreign prince to invade this realm; it was adjudged an overt-act to make good an indictment of compassing the queen's death (*x*). *Vide Anderson's Reports Placito* 154. which was the case of *Arden* and *Somerville* and others, who conspired the death of queen *Elizabeth*, resolved by all the justices, that a meeting together of these accomplices to consult touching the manner of effecting it was an overt-act to prove it, as well as *Somerville's* buying of a dagger actually to have executed it. *Anderson's Rep. Pars I. p.* 104.

And yet this difference seems to me agreeable to law, and reconciles in some measure both resolutions.

An assembly to levy war against the king, either to depose or restrain, or enforce him to any act, or to come to his presence to remove his counsellors or ministers, or to fight against the king's lieutenant or military commisionate officers, is an overt act proving the compassing of the death of the king; for such [123] a war is directed against the very person of the king, and he, that designs to fight against the king, cannot but know, at least, it must hazard his life; such was the case of the earl of *Essex* and some others.

(*u*) But yet it does by no means follow from thence, that this resolution is right as to this point any more than as to the other resolved at the same time, which yet our author thinks to be wrong; were it a point of common law the repeated resolutions of the judges is the only way to know what the law is; but where the question arises upon an act of parliament, that is to be the rule for courts of justice to go by, of which they are to judge according to their own reason and understanding, and are not in such cases tied down by former determinations any farther than the reasons or arguments thereof appear conclusive,

for *judicandum est legibus non exemplis. Co. P.C. 6. in margine.* A bare conspiracy to levy war is certainly not treason, and was so adjudged in the case of *Sir John Friend*; but if it appears upon evidence, that the design was to kill the king, or depose him or imprison him, or put any force on him, and the levying war was only the way or method made use of to effect that design, then it will be an overt-act of compassing the death of the king; and this is the distinction taken by lord chief justice *Holt* in *Sir John Friend's* case, *State Tr. Vol. IV. p.* 613, 614.

(*x*) See 2 *Vent.* 315.

But if it be a levying of war against the king merely by interpretation and construction of law, as that of *Burton* (y), and others, to pull down all enclosures, and that of the apprentices in *London* lately, to pull down all bawdy-houses (z), *de quibus infra*, this seems not to be an evidence of an overt-act to prove compassing the king's death, when it is so disclosed upon the proof, or if it be so particularly laid in the indictment; tho *prima facie* if it be barely laid as a levying war against the king in the indictment, it is a good overt-act to serve an indictment of compassing the king's death, till upon evidence it shall be disclosed to be only to the purpose aforesaid, and so only an interpretative or constructive levying of war. And *Burton's* case 39 *Eliz.* seems to intimate as much, because they took him to be indictable only upon the statute of 13 *Eliz. cap. 1.* for conspiring to levy war against the queen, whereas if this had been an overt-act to prove the compassing of the death of the king, the fact had been treason within 25 *E. 3.* as surely it would have been, if he had conspired to have raised a war directly against the king or his forces, and assembled people for that purpose, tho an actual war had been caused by him.

But such a levying of war may in process of time rise into a direct war against the king; as if the king send his forces to suppress them, and they fight the king's forces; and then it may be an overt-act to prove the compassing of the king's death.

And thus far of compassing the king's death.

Something I shall add touching the compassing of the death of the queen, or prince, wherein I shall first consider, what shall be said *the queen*, or *their eldest son* within this act. 2. What a compassing of their death.

[124] I. A queen dowager, namely the queen after the death of her husband, is not a queen within this act, for tho she bear the title of queen, and hath many prerogatives answering the dignity of her person, yet she is not (*his queen*) or, as the other parts of the act express it, (*his companion*) it must be the queen consort, the king's wife, and during the marriage between them.

2. The queen divorced from the king a *vinculo matrimonii*, as for cause of confanguinity, is not a queen within this act, tho the king be living: this was the case of queen *Katharine*, who was first married to prince *Arthur*, and by him, as was said, carnally known, and

after his death married to prince *Henry* (afterwards king *Henry VIII.*), by whom she had issue *Mary* (afterward queen of *England*), and afterwards after twenty years marriage was divorced *causâ affinitatis*, which divorce was confirmed in the parliament 25 *H. 8. cap. 22.*

This was also the case of his second wife queen *Anne*, who was also divorced *a vinculo*, and that divorce confirmed by the statute of 28 *H. 8. cap. 7.* which nevertheless was again repealed in part by the statute of 35 *H. 8. cap. 1.* and in effect wholly by the statute of 1 *Eliz. cap. 3.* and yet there is one clause observable in the act of 28 *H. 8.* that treasons committed against queen *Anne*, or the lady *Elizabeth* her daughter, mesne between the marriage and that divorce were punishable, altho the divorce made a nullity of the marriage; and therefore there is a special clause to pardon all such treasons, so that the relation of the divorce, and separation to dissolve the marriage *ab initio*, was not thought sufficient to discharge those treasons, without a special pardon discharging the treasons committed against them.

But we need not put the case of a divorce *a mensâ & thoro causâ adulterii*, because adultery by the king's wife is high treason in her, and so the case of a divorce cannot well come in question, for she must be executed for treason. *P. 28 H. 8. Spilman's Rep. (a). 33 H. 8. cap. 21. (b). Co. P. C. p. 9.*

II. *Ou leur fitz eigne & heir.*

At common law compassing the death of any of the king's ^[125] children, and declaring it by overt-act was taken to be treason, *Britton, ubi supra*; but by this act it is restrained to the eldest son and heir.

1. *The eldest son and heir* extends not to a collateral heir, tho declared heir apparent to the crown, unless there be a special provision for that purpose by act of parliament: thus *Roger Mortimer 11 R. 2. Richard duke of York 39 H. 6. John de la Poole tempore R. 3. and Henry marquis of Exeter tempore H. 8.* were declared heirs apparent of the crown; yet compassing any of their deaths in the king's lifetime was not treason within this act. *Co. P. C. 8, 9.*

And therefore in that great agreement made in the parliament of 39 *H. 6.* when *Richard* duke of *York* made his claim to the crown, and it was enacted, that *H. 6.* should hold the crown during his life, and that *Richard* duke of *York* should succeed him, *Rot. Parl. 39*

(a) In the case of queen *Anne Boleyn*.
Howard.

(b) In the case of queen *Katharine.*

H. 6. n. 24. it is specially enacted, that if any person do compass or imagine the death of the duke, and thereof be attaint by open act, it shall be high treason; which had not been so, unless it had been especially enacted.

2. The king takes wife, and by her hath issue two sons, the eldest dies, the wife dies, he takes a second wife; this second son, tho he were once not eldest, and tho he be not *lour eigne fitz*, but only the king's son, is eldest son within this statute.

3. King *Edward III.* had issue the *Black Prince*, who had issue *Richard of Burdeaux* afterwards king *Richard II.* his son and so grand-child, tho he were not, in the life of his father the *Black Prince*, the king's eldest son within this statute, yet his father being dead in the life of *Edward III.* it may be very considerable whether prince *Richard* be the king's eldest son within this statute, and the compassing of his death be high treason; for he is heir apparent of the crown, and his heirship cannot be devested by any after born child.

The duchy of *Cornwall* was settled upon the *Black Prince* & *ipsius* [126] & *heredum suorum regum Angliæ filii primogenitis*, altho the king's eldest daughter be not duchess of *Cornwall*, because not *filia*; yet, (contrary to the opinion delivered in the prince's case 8 *Co. Rep.* 30. a) *H. 8.* after the death of his brother prince *Arthur*, and our late king *Charles*, after the death of his eldest brother prince *Henry*, were dukes of *Cornwall* in the life of their fathers: the latter appears expressly by the statute of 21 *Jac. cap.* 29. wherein it is so declared by judgment of parliament; and *Richard of Burdeaux* was also duke of *Cornwall* after the death of his father the *Black Prince*, and comes in the catalogue of dukes of *Cornwall* in the collection of *Vincent and Mills* of the nobility of *England*; and had the revenues thereunto belonging, as appears undeniably. *Rot. Parl.* 51 *E. 3. n.* 65.

But it seems it was not by virtue of that limitation in the grant to the *Black Prince*, but by a new special creation; for *Rot. Parl.* 50 *E. 3. n.* 50. the commons petition, that he might be created duke of *Cornwall*, earl of *Chester*, and prince of *Wales*; the king declined the doing of it at their request, as being a thing proper only for the king to do his pleasure therein: the truth is, the king had done it before the request made, viz. *Rot. Cart.* 47, 48 & 49 *E. 3. n.* 10. the words of the charter are, "*Ex consilio & consensu prelatorum, ducum, comitum & baronum, ipsum Ricardum principem Walliæ,*"
"ducem

“*ducem Cornubiæ, & comitem Cestrizæ fecimus & creavimus,*” and grants him the possessions thereunto belonging, which he accordingly enjoyed: *vide Rot. Parl.* 51 *E.* 3. *n.* 9. and observe a certain estate is limited by the patent of creation for life; or otherwise, it seems, it was thought fit to leave it to the construction of law, whether he had it purely by a new creation, or by the construction of the charter 11 *E.* 2. to the *Black Prince*.

This case therefore touching conspiring the death of such a prince, as *Richard of Burdeaux* then was, tho it may be probable to be treason without the levying of this act, is fittest to be first decided by parliament. *acc.* 3. O to the caution used in the statute of 25 *E.* 3.

3. If the king of *England* hath two daughters only, and no son, the eldest daughter is not within the words or intent of the king's eldest son within this clause, for a son may be after ^[127] born; but several statutes have made temporary provisions in this case: *vide* the statutes of 25 *H.* 8. *cap.* 22. 28 *H.* 8. *cap.* 7.

It is true the implication of *Co. P. C.* p. 9. where it is said, “*If the heir apparent be collateral heir apparent, he is not within this statute, until it be declared by parliament,*” implies that the lineal heir, male or female, is within this statute.

But the implication of the statute itself is against it, because this act almost in the same breath takes notice of the king's eldest daughter upon another rank of treason, namely defiling her; and it is not safe to extend this act by construction.

The second daughter, living the first, is certainly not within this law, because not immediately inheritable to the crown.

Yet by the statute of 25 *H.* 8. *cap.* 22. which was but temporary, provision is made, that if any thing should be written or done to the peril, slander or disherison of any of the issues and heirs between him and queen *Anne*, the same should be treason.

Thus far touching the persons of the queen or prince.

Now what shall be said a compassing of their death, or an overt act to prove the same: what shall be said a compassing of the king's death, hath been at large declared, much whereof may be applied to the queen or prince, but not universally; for the king is above the coercion of the law, tho his actions are not exempted from the direction of the law in many cases; but the queen and prince are subjects of the king, and subject to the laws; whence it comes to pass, that there are certain overt-acts manifesting compassing the king's death,

death, which are specifical and appropriate to the king and his sovereign power and royal dignity, which are not applicable to the queen or prince.

If a man compass to imprison the king, tho it be colourably done by process of law, it is a compassing of the king's death within this act, as hath been shewn.

But if the queen or prince commit a misdemeanor of such a nature, as is a contempt against the king's laws, to which imprisonment is proper, as in case of treason, ^{felony, &c.} ~~felony, &c.~~ they [128] may be imprisoned by process of law ^{and a danger of treason}: thus was the son of Henry IV. committed ^{as a danger of treason} for rescuing a prisoner from the bar; and several acts of attainder of treason have passed in parliament against some queen-consorts, as appears by 28 H. 8. cap. 7. 33 H. 8. cap. 21. against queen Catharine Howard. Rot. Parl. 5 H. 5. n. 11.

Again, to compass to depose the king is treason, but to compass a divorce between the king and queen by the king's commission by due process of law was no treason, as appears in the process before the archbishop of Canterbury, whereupon queen Catherine, and afterwards queen Anne were divorced.

The compassing therefore of the death of the queen or prince, which is treason within this act, is where a man without due process of law expressly compasseth the wounding or death of them either by force or poison.

And thus much for treason in compassing the death of the king, queen, or prince; and because the next treason declared, namely the violation of the king's wife, the king's eldest son's wife, the king's eldest daughter, hath not much to be said concerning it, I shall close this chapter with it.

1. *The violating the king's companion*, that is the king's wife, the queen consort, her husband being now living; this is high treason, and so it is in her if she consent. P. 28 H. 8. 33 H. 8. cap. 21. Co. P. C. p. 9.

2. *The wife of the king's eldest son and heir*, a princess consort, and during the coverture between them; and if she consent, it is treason in her.

3. *The king's eldest daughter not married*: this extends to a second daughter, the eldest being dead; for she is now eldest, and, for want of issue male, inheritable to the crown; but at common law this

this treason extended to any of the daughters. *Britton*, cap. 22. §. 71. It extends to an eldest daughter, tho there be sons; and *quære*, whether to an eldest daughter, that hath been married, and is now a widow, *nient marry* may be construed either way; or if it doth, yet whether it extends to an eldest daughter, that is a widow, and hath children by her husband; the words of the old books [129] are *avant ceo, qel est marry*: it seems, that if the eldest daughter hath been once married, she is not within this law, because of the words *nient marry*, tho the reason may possibly be the same; and it seems, *qel est leys sons*, yet the violating of the king's eldest daughter, being within the express words of the law, the violation of her is within this law, because within the words; and yet the violation of the wife of the king's second son is not within this statute, yet he and his issue is inheritable to the crown before the eldest daughter; in this case therefore the words of the law are to govern.

Altho it should seem probable, that the eldest son of the prince after the death of his father may be the king's eldest son within this act, as is before observed; yet the daughter of the king's eldest daughter, after her mother's death, seems not an eldest daughter within this act, her grandfather being living, for the grandson, who is heir apparent of the crown, is of more consideration than the daughter of a daughter, who cannot be heir apparent, because a son may be born.

Quære, Whether violating the eldest daughter, after the death of the king her father, be treason within this act, where a son succeeds to the crown: it seems not, for the relation is ceased (*c*).

And thus far for the two first branches of high treason.

¶ Blackf. Com. ch. vi. page 76. Co. Lit. 133. b. 1 Hawk. P. C. 34, 36, 37. Moore, 620. 2 Vent. 316. Bro. Treason, pl. 24. Co. P. C. 7. Folt. 397, 400, 403. Kelyng. 8. 12. 13. pl. 19.

(*c*) She is no longer *laigne fille le roy*. It having been before observed that a queen regent is a king within this act, it follows

of course that the eldest son and eldest daughter of such a queen is likewise within it. Co. P. C. p. 8.